TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 56.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JONAS S. BOURMAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED APRIL 8, 1907.

(20,652.)

(20,652.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 56.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JONAS S. BOURMAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the eastern district of Lousiana	1	1
Caption	1	1
Transcript from State court	2	2
Petition	2	2
Summons	5*a*	5
Sheriff's return	5*b*	5
Petition for removal	5	6
Bond for removal	7	8
Affidavit for removal	9	9
Order for removal	9	9
Clerk's certificate	9	10
Defendant's exception of no cause of action	10	10
Order overruling exception	10	11
Answer	11	11
Motion for costs	12	12
Order on motion for costs	12	12
Bond for costs	13	13
Supplemental and amended answer	13	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 16, 1908.

	Original.	Print.
Case called, jury and continuance (first trial)	14	14
Second supplemental and amended answer	15	14
Hearing and verdict	16	15
Motion for new trial	17	16
Motion and order to show cause	18	17
Order restoring case to trial docket	18	17
Opinion on restoring case to trial docket	19	18
Order setting aside verdict and granting new trial	20	19
Case called, jury and continuance (second trial)	21	20
Hearing and verdict	22	20
Stipulation as to testimony on second trial	23	21
Memorandum of testimony	23	22
Charge of the court	26	23
Order fixing time to prepare bills of exceptions	29	26
Bill of exceptions No. 1	30	27
Statement as to testimony	30	27
Motion and grounds for verdict for defendant	30	27
Judge's certificate to bill of exceptions	31	28
Bill of exceptions No. 2	31	28
Defendant's request for instructions	32	28
Judge's certificate to bill of exceptions	32	29
Bill of exceptions No. 3	32	29
Defendant's request for instructions	33	29
Judge's certificate to bill of exceptions	33	29
Bill of exceptions No. 4	33	30
Defendant's request for instructions	34	30
Judge's certificate to bill of exceptions	34	30
Bill of exceptions No. 5	34	31
Defendant's request for instructions	35	31
Judge's certificate to bill of exceptions	35	31
Bill of exceptions No. 6	35	32
Defendant's request for instructions	36	32
Judge's certificate to bill of exceptions	36	32
Bill of exceptions No. 7	36	33
Defendant's request for instructions	37	33
Judge's certificate to bill of exceptions	37	33
Bill of exceptions No. 8	37	34
Defendant's request for instructions	38	34
Judge's certificate to bill of exceptions	38	34
Bill of exceptions No. 9	39	35
Charge of the court	39	35
Judge's certificate to bill of exceptions	40	35
Testimony of Jonas S. Bourman, plaintiff	40	36
Clara Cleveland, for plaintiff	49	43
Willie Holmes, for plaintiff	52	46
Joe Fitzhugh, for plaintiff	57	50
Frank Smith, for plaintiff	58	51
J. B. Paul, for defendant	59	52
A. J. Wolf, for defendant	62	54
S. B. Smith, for defendant	67	58
V. F. Brutbacher, for defendant	68	59
R. C. Strain, for defendant	70	60
Jonas S. Bourman, plaintiff (recalled in rebuttal)	70	61

	Original.	Print.
Willie Holmes, for plaintiff (recalled in rebuttal).	72	62
Clara Cleveland, for plaintiff (recalled in rebuttal).	72	63
Motion for new trial	73	63
Order refusing motion for new trial	75	64
Final judgment	75	65
Petition for writ of error and order allowing, etc.	76	65
Assignment of errors	77	66
Bond	80	69
Clerk's certificate	82	70
Writ of error	83	70
Citation	85	71
Order designating judge	86	72
Argument and submission	86	72
Opinion	88	73
Judgment	91	75
Assignment of errors	92	75
Bond on writ of error	96	77
Writ of error	97	78
Citation and service	98	79
Clerk's certificate	100	80

a UNITED STATES OF AMERICA, *Fifth Judicial Circuit:*

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the third Monday of November, 1906, at New Orleans, Louisiana, before Honorable A. P. McCormick, the Honorable David D. Shelby, Circuit Judges, and the Honorable William T. Newman, District Judge.

No. 1562.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JONAS S. BOURMAN, Defendant in Error.

Be it remembered, That heretofore, to-wit: on the 16th day of May, 1906, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Eastern District of Louisiana was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

1 UNITED STATES OF AMERICA: Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

No. 13158.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
JONAS S. BOURMAN, Defendant in Error.

Howe, Spencer & Cocke, Esqrs., for the Texas & Pacific Railway Company, Plaintiff in Error.

A. E. & O. S. Livaudias, Esqrs., and Albert Voorhies, Esq., for Jonas S. Bourman, Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, from the United States Circuit Court of Appeals for the Fifth Circuit, returnable within thirty (30) days from April twentieth (20th), A. D. 1906, at the City of New Orleans, State of Louisiana.

TRANSCRIPT OF RECORD.

2 *Transcript of Removal from the 28th Judicial District Court of Parish of Jefferson.*

Filed April 6, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

Petition.

Filed November 12th, 1902.

To the Honorable the Twenty-eighth Judicial District Court for the Parish of Jefferson:

The petition of Jonas S. Bourman, a resident of the Parish of St. John the Baptist, most respectfully represents:

That the Texas & Pacific Railway Company, a corporation doing business in this State as common carriers, and whereof Robert Strong, a resident of the City of New Orleans, this State, is the person named by said corporation upon whom legal process shall be served, is justly and truly indebted unto your petitioner in the full sum of ten thousand dollars ($10,000.00) exclusive of interest for this to-wit:

That on the second day of December, nineteen hundred and one, at about the hour of eight o'clock A. M., at a place known as Waggaman Station, situated in the Parish of Jefferson, in this State, through the carelessness and negligence of the said defendant's agents, your petitioner while alighting from one of the passenger cars of the said defendant company, fell and was run over, and his right leg was cut, crushed and mangled to an extent necessitating the amputation of your petitioner's said limb, a few inches below the knee, entailing upon your petitioner the grievous damages and injuries which are hereafter more particularly and specifically set forth.

Petitioner represents that on the said second day of December, nineteen hundred and one, he was in the employ of the said defendant as a laborer, or section hand, attached to section No. 60, located at a point situated at Waggaman, in the Parish of Jefferson, on the line

of said company, under charge of one Willie Hardy, a foreman of said section.

3 Petitioner now represents that on the day preceding said occurrence, he, together with other section laborers in charge of their said foreman were conveyed by the said defendants in one of their cars to Davis Station, in the Parish of St. Charles, a distance of about five (5) miles from the said Waggaman Station, for the purpose of clearing a wreck which had there taken place on the line of said company.

That your petitioner, his co-laborers and their said foreman were taken on board a wrecking train of the said defendant from Waggaman Station at about 8 o'clock A. M. and that the said wrecking train remained at Davis Station until 10 P. M. and left. That your petitioner had been informed and verily believed that he would be brought back to Waggaman Station on a hand car. That your petitioner who, with his fellow laborers had been brought to Waggaman, having completed his work, was entitled to a safe transport to his point of departure. That at about 7:30 A. M. in the morning of December 2nd, 1901, he and his fellow laborers were instructed by their said foreman, the agent of the said company, having them in charge, to board the passenger train No. 52 of said company which was then on its way to New Orleans, passing Waggaman Station. That acting under said instructions your petitioner, who was carrying his tools (three shovels) together with his companions and his said foreman, boarded said train, No. 52, having been told by their said foreman to alight at Waggaman Station. That the trains of the defendant company in their daily run, are known to slack their speed at Waggaman Station for the mail, and that on that particular occasion, their agents and employees, knowing that there were railroad laborers on board to be put off at that station, were in duty bound to stop their train at such station or at least to slack speed sufficiently to allow said laborers to alight in safety. That it had been the custom on such occasions for the train to slack its speed sufficiently to allow them to throw their tools and to alight when the train arrived at this station.

Petitioner represents that upon the train arriving at said station he having, as instructed by his foreman, thrown his tools and being prepared to alight, was standing on the lower step in front of the colored coach, prepared to alight by extending his left leg towards the front, or direction of motion of said train, as customary when alighting from a car running at slow speed. That at that moment his co-laborers, named C. B. Lawson, Henry Hardy, Willie Holmes and Willie Hardy, their foreman, were standing on the adjoining ascending steps immediately above your petitioner, ready to follow

4 your petitioner as he alighted when the train had slacked its speed, and, as instructed by his foreman; that the train being about to pass the station your petitioner had no further alternative than when ordered [by] his foreman, to jump from the moving train, which just then increased its speed, and whose momentum upon his left foot touching the ground carried his body on a run of four or five paces when he fell down forward and his right leg ex-

tended on the track was run over, cut, crushed and mangled by the rear wheel of the coach next following on the train.

Petitioner now represents that he was at the time an able-bodied man, capable of earning his living as a laborer, and that the loss of his right leg has forever blasted his expectations of advancement, destroyed most of his usefulness as a bread earner, that he is disabled for life, being unable to perform the work which his station of life would call for. That he is now twenty years of age. [He] has been duly emancipated by judgment of the Honorable the Civil District Court of the Parish of Orleans, rendered in the matter of the emancipation of Jonas S. Boorman, No. 68,331 of the docket of said Court.

Petitioner further represents that in consequence of his said misfortune, due to the fault and negligence of the said defendants and their agents, he has suffered damages in the sum of ten thousand dollars, which he now claims and which he figures as follows, to-wit:

For physical pain suffered by your petitioner at the moment said injury was inflicted upon his person and moral anguish and torture both at that time and during the operation of amputation of his limb, and since and up to the time of the healing of his said leg, the sum of $5,000.00.

For the deprivation of his leg and the incapacitation through life of undertaking the work his station of life calls for, the loss of all prospects, of advancement, the sufferings, worries, humiliations, vexations and mental and physical, dependent upon his present condition as a cripple during the remaining years of his life, the sum of $5,000.00.

Petitioner further alleges that he has vainly called up the defendant for a reparation of the wrong and injury inflicted upon him through the fault and negligence of its employees.

Wherefore, the premises considered, petitioner prays that the defendant, the Texas & Pacific Railway Company, be cited to appear and to answer this petition, and that after due proceedings there be judgment in favor of your petitioner and against the said defendant, for the full sum of ten thousand dollars ($10,000.00), with legal interest from judicial demand until paid, and petitioner further prays for costs and for genereal relief, and for trial by jury.

(Sig.) A. E. & O. S. LIVAUDAIS, *Att'ys.*

5a *Citation on the Texas & Pacific Railway Company.*

Issued Nov. 12th, 1902.

Citation.

STATE OF LOUISIANA: Twenty-eighth Judicial District Court for the Parish of Jefferson.

No. 254.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

The Texas & Pacific Railway Company:

You are hereby summoned to comply with the demand contained in the Petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the Clerk of the Twenty-eighth Judicial District Court, for the Parish of Jefferson, within 10 days after the service hereof, adding one day for each ten miles your residence is distant from the Court House.

5b Witness the Honorable J. L. Gaudet, Judge of the said Court, this 12th day of November in the year of our Lord, 1902.

Clerk's Office, Court House, Nov. 12th, 1902. Corner Newton and Third streets, Mechanickham.

(Sig.) J. C. TILLOTSON, *Clerk.*

Return on Citation.

Filed November 24, 1902.

Received Saturday Nov. 15, 1902, and on the 17th day of November, 1902, at 10:45 A. M. I served a copy of the within Citation and accompanying Petition on the Texas and Pacific Railway Company, defendant herein, by personal service on Robert Strong, its duly authorized agent in this City.

Returned same day.

Sheriffs fees $1.50.

(Sig.) C. M. GROSS,
Deputy Sheriff.

5 *Petition for Removal to United States Circuit Court for the 5th Circuit and Eastern District of Louisiana.*

Filed November 20th, 1902.

Twenty-eighth Judicial District Court in and for the Parish of Jefferson.

No. 254.

JONAS S. BOORMAN
vs.
THE TEXAS & PACIFIC RAILWAY CO.

To the Honorable the Twenty-Eighth Judicial District Court in and for the Parish of Jefferson:

The petition of the Texas & Pacific Railway Company, defendant in the above entitled and numbered cause, with respect represents:

That your petitioner, the Texas & Pacific Railway Company, was prior to the beginning of this suit, and now is, a corporation created by and organized under and by virtue of certain acts of the Congress of the United States, to-wit:

First. An Act to incorporate the Texas & Pacific Railroad Company and to aid in the construction of its road, and for purposes, approved March 3, 1871, being Chapter 122 of the Public Laws of the United States for 1871.

Second. An Act supplemental to the foregoing Act, approved May 2, 1872, being Chapter 132 of the Public Laws of the United States of 1872.

Third. An Act supplemental to the said Act of 1871, approved March 3, 1873, being Chapter 257 of the Public Laws of the United States for the year 1873.

Fourth. An Act supplemental to the said Act of 1871, ap-
6 proved June 22, 1874, being Chapter 406 of the Public Laws of the United States of the year 1874.

That the Southern Pacific Railway Company of Texas, created by Act of the Legislature of that State, of February 16, 1856, and the Southern Trans-Continental Railway Company of Texas, created by Act of the Legislature of said State of July 27th, 1870, were prior to the said 22nd day of June, 1874, merged in and consolidated with the said The Texas & Pacific Railway Company, and your petitioner, the said The Texas & Pacific Railway Company, acquired and now owns all the property, rights, powers privileges and franchises of the said Southern Pacific Railway Company and said Southern Trans-Continental Railway Company, and said acquisition and merger were recognized, affirmed and approved by said Acts of Congress of June 22, 1874. That under the powers thus conferred and confirmed by said Acts of Congress of the United States, your petitioner has acquired, completed, possessed and operated its railway from El Paso, Texas, to New Orleans, Louisiana, passing through the Parish of Jef-

ferson, in the said State of Louisiana, and has been thus operating the same line of railway concerning which allegations are made by the plaintiff in the petition in this cause, and the said railway is operated and used as a medium of interstate commerce and for the transportation of the United States mail.

That your petitioner has on the 17 day of November, 1902, been served with process and cited to appear before this Honorable Court in this cause, and this petition for removal is made and filed before petitioner and defendant in this case, is required by the laws of this State and the rules of this Court to answer and plead to the petition, declaration or complaint of the plaintiff, and the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum and value of two thousand dollars.

That the said suit arises under the Constitution and laws of the United States, and that the controversy between the plaintiff and the defendant herein arises under and is to be determined by the laws of the United States, and especially under the Acts of Congress above cited, the rights immunities and exemptions conferred by which this petitioner, defendant in this cause specifically sets up and claims herein:

That your petitioner, the said The Texas and Pacific Railway Company, is desirous of removing this cause to the Circuit Court of the United States, for the Fifth Circuit and Eastern District of
7 Louisiana, and your petitioner offers and files herewith bond with good and sufficient surety according to law for entering in said Circuit Court of the United States, on the first day of its then next term, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and for appearing and entering special bail therein, if the same be required, and otherwise conditioned according to law.

Wherefore, petitioner prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept this petition and the said bond and surety, and to cause the record herein to be removed into the said Circuit Court of the United States, in and for the Fifth Circuit and Eastern District of Louisiana, and for all necessary orders and general relief.

(Sig) HOWE, SPENCER & COCKE, &
L. De POORTER, *Local Att.*
Attorneys for the Texas & Pacific Ry. Co.

Bond Annexed to Petition for Removal.

Filed Same Day.

Twenty-Eighth Judicial District Court in and for the Parish of Jefferson.

Bond.

No. 254.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Know all men by these presents, That, we, The Texas & Pacific Railway Company, as principal, and Pearl Wight, of the Parish of Orleans, as surety, are held and firmly bound unto Jonas S. Bourman, plaintiff in above entitled cause, and all others persons whom it may concern, in the penal sum of five hundred dollars, for the payment of which, well and truly, to be made, we bind ourselves, our heirs, administrators and executors jointly and severally by these presents.

Thus dated and signed this 18 day of November, 1902.

The condition of the above obligation is such that whereas the said The Texas & Pacific Railway Company has applied to the Twenty-Eighth Judicial District Court in and for the Parish
8 of Jefferson and State of Louisiana, to remove a certain cause pending in said Court, wherein Jonas S. Bourman, is plaintiff, and The Texas & Pacific Railway Company is defendant, from the said Twenty-Eighth Judicial District Court to the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana.

Now, therefore, if the said The Texas & Pacific Railway Company shall enter in the said Circuit Court of the United States, for the Eastern District of Louisiana on the first day of the next term thereof, a copy of the record in said suit, and shall pay all the costs that may accrue or be awarded by the said Court, if it shall be held that the said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in the said Circuit Court in the said suit, if special bail was originally required therein, then this obligation to be void, otherwise to remain in full force and effect.

(Sig) THE TEXAS & PACIFIC RAILWAY COMPANY,
By ROBT. STRONG, *Agent.*
By PEARL WIGHT, *Surety.*

Affidavit of Surety Annexed to Petition for Removal.

(Filed Same Day.)

STATE OF LOUISIANA, *Parish of Orleans:*

I, Pearl Wight, of Orleans Parish, Louisiana, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Louisiana and Eastern District of Louisiana, and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property exempt from law and execution; and that I have property in the State of Louisiana and Eastern District thereof, liable to execution, of the value of five hundred dollars and more.

(Sig) PEARL WIGHT.

Sworn to and subscribed before me, this 18" day of November, 1902.

[SEAL] (Sig) J. G. EUSTIS, *Not. Pub.*

9 *Affidavit Annexed to Petition for Removal to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.*

(Filed Same Day.)

Affidavit.

STATE OF LOUISIANA, *Parish of Orleans:*

Robert Strong, being duly sworn, deposes and says, that he is the duly authorized agent in the State of Louisiana, for the Texas & Pacific Railway Company, and that he is authorized for and on behalf of said Railway Company to make this application for removal and this affidavit, and to sign the bond for removal which is tendered herewith; and that the foregoing petition is true.

(Sig) ROBT. STRONG.

Sworn to and subscribed before me, this 18" day of November, 1902.

(Sig) J. G. EUSTIS,
Notary Public.

Order Annexed to Petition for Removal.

(Filed Same Day.)

On consideration of the foregoing petition and annexed bond, it is ordered that the said petition and bond be and the same are hereby accepted, and that this Court proceed no further in the foregoing entitled and numbered suit, and that the same be removed to the

Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, as prayed for in said petition and according to the statutes in such cases made and provided.

Granted, Parish of Jefferson, November 20th, 1902.

(Sig) J. L. GAUDET,
Judge, Twenty-Eighth Judicial District Court,
for the Parish of Jefferson.

UNITED STATES OF AMERICA, *State of Louisiana, Parish of Jefferson:*

I, John C. Tillotson, Clerk of the 28th Judicial District
10 Court in and for the Parish of Jefferson, State of Louisiana, do hereby certify that the foregoing Twelve (12) pages do contain a true and correct copy of all proceedings had and documents filed in the suit entitled, Jonas S. Boorman, *vs.* The Texas and Pacific Railway Company, No. 254, of the Docket of the said Court.

In witness whereof, I have hereunto set my hand and affixed the impress of my seal of office in the Parish of Jefferson, Louisiana, this 24th day of November, A. D. 1902.

[SEAL] (Sig) J. C. TILLOTSON,
Clerk, 28th Judicial District Court,
Parish of Jefferson, La.

Exception.

Filed April 8th, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now, into Court, through undersigned counsel, comes the defendant, and for peremptory exception to the petition of plaintiff, says:

That the said petition discloses no cause of action against this defendant;

Wherefore, *its* [it] prays that this exception be maintained, and plaintiff's suit dismissed at his costs.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Deft.

* * * * * * *

Order Overruling Exceptions.

Extract from the Minutes.

November Term, 1902.

NEW ORLEANS, SATURDAY, *April 18th*, 1903.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

11 No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY CO.

This cause came on to be heard upon the exceptions filed by defendant; Howe, Spencer & Cocke, appearing for Exceptor; A. E. Livaudias, for Plaintiff in suit, and was argued by counsel.
Whereupon and on consideration thereof it is ordered that said exception be overruled.

Answer.

Filed April 21, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now, into Court, through undersigned counsel, comes the defendant, and reserving to itself the benefit of the exception heretofore filed and overruled, for answer to the petition of plaintiff, says:
1. That it denies, all and singular, the allegations in said petition contained, except such as may be hereinafter expressly admitted.
2. It admits that the said plaintiff was, on the second day of December, 1901, employed by defendant as a laborer.
3. It expressly denies that the said plaintiff was injured by any act, neglect or default on its part or on the part of any person or persons for whose acts, defaults or neglects it was responsible; and avers that if said plaintiff was injured (which is denied) that then and in that event, the plaintiff was injured by his own act, neglect or default, or by the act, neglect or default of his fellow servants, the risk of injury from which he assumed.

Wherefore, defendant prays for judgment in its favor and against said plaintiff, dismissing his suit at his costs.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Def't.

12 *Motion for Costs.*

Filed April 21, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY CO.

On motion of Howe, Spencer & Cocke, Attorneys for the defendant:

It is ordered that the plaintiff in the above suit do give bond for costs in the sum of fifty dollars within ten days from the date thereof under penalty of having the suit stand dismissed according to law.

* * * * * * *

Order Making Rule for Bond for Costs Absolute.

Extract from the Minutes.

April Term, 1903.

NEW ORLEANS, WEDNESDAY, *April 29th,* 1903.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY CO.

This cause came on to be heard at a former day upon the motion filed by the defendant to require plaintiff to furnish a bond for costs, and was argued by counsel and submitted.

Whereupon, the Court having duly considered the same, it is ordered that the plaintiff do furnish a bond for costs in the sum of twenty-five dollars, within 15 days.

13 *Bond for Costs.*

Filed May 5th, 1903.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC R. R. Co.

I, the undersigned do hereby bind and obligate myself as surety for costs in the above entitled suit in the sum of twenty-five dollars ($25.00).

New Orleans, May 5th, 1903.

(Signed) ALBERT LESSEPS.

Supplemental and Amended Answer.

Filed April 19th, 1904.

United State- Circuit Court, Eastern District of Louisiana.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Now, into Court through undersigned counsel, comes the defendant, and, with leave of Court first had, files this its supplemental and amended answer, and says:

1. It reiterates all and singular the allegations in its original answer contained.

2. It avers that the said plaintiff if injured at all, (which is denied) was injured by his own voluntary act and default in unnecessarily jumping from the train upon which he was being transported while the said train was in motion; or by the acts, neglects or defaults of his fellow servants, to-wit, by act and default of the foreman under whose charge, the said plaintiff was at the time of the said alleged injury, in ordering and requiring said plaintiff (if said foreman did order and require said plaintiff, which is denied) to jump from said moving train; or by the neglect and default of the con-

14 ductor and engineer of said train in failing to reasonably stop the train in order that the plaintiff might have an opportunity to alight, if they fail to seasonably stop said train for that purpose, which is denied.

Wherefore, defendant prays for leave to file this supplemental and amended answer and as heretofore for judgment in its favor and against said plaintiff rejecting his demand at his costs.

(Signed) HOWE SPENCER & COCKE,
Att'ys for Def't.

Order.

April 19, 1904.

Let the foregoing supplemental and amended answer be filed.
(Signed) CHARLES PARLANGE,
U. S. Judge.

* * * * * * *

Case Called, Jury and Continuance.

Extract from the Minutes.

November Term, 1903.

NEW ORLEANS, THURSDAY, *April* 21, 1904.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY CO.

This case was called this day for trial. A. E. Livaudais appearing for Plaintiff; Howe, Spencer & Cocke, for the Defendant.

Whereupon the following named jurors were called and sworn, to well and truly try the issue joined herein, to-wit:

1. H. C. Grevier.
2. D. H. Homes.
3. A. E. Marion.
4. C. W. Staub.
5. Edgar Fassman.
6. R. D. Fisher.
7. M. E. Culligan.
8. W. J. Hardin.
9. W. T. Russell.
10. Geo. H. Bernos.
11. Frank J. Schulte.
12. T. B. Carre.

15 When the Court appointed H. C. Grevier, foreman of the Jury, and the trial was proceeded with.

After hearing the pleadings, evidence and testimony, it was ordered that the cause be continued until tomorrow at 11 A. M.

Second Supplemental & Amended Answer.

Filed April 22, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. ——.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendant by undersigned counsel, and, with leave of Court first had, files this its second supplemental and amended answer and reiterating the averments of its previous answer, says:

It denies specially the existence of any such custom as is alleged in said plaintiff's petition, and avers that if any such custom existed (which is denied) then and in that event the plaintiff well knew of the same and of the risk connected therewith and incident thereto, and assumed such risk in attempting to jump from said train while in motion.

Wherefore it prays as heretofore for judgment in its favor dismissing plaintiff's suit at his costs.

(Signed) HOWE, SPENCER & COCKE,
Attorneys for Defendant.

Order.

Let the foregoing supplemental and amended answer be filed.
April 22, 1904.

(Signed) CHARLES PARLANGE,
U. S. Judge.

16 *Hearing and Verdict.*

Extract from the Minutes.

November Term, 1903.

NEW ORLEANS, FRIDAY, *April* 22, 1904.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

This cause as continued from yesterday was this day resumed and the counsel for the respective parties as well as the jurors impanelled in the cause being all present the trial was proceeded with.

After hearing further evidence and testimony, and at the close of the testimony, in the case, a motion was made by the counsel for the defendant to have the Court direct the jury to find a verdict for the defendant.

The Court heard arguments from the counsel for both parties, and upon consideration thereof, granted the motion of defendant, counsel for plaintiff reserving a bill of exceptions to the ruling of the Court.

And thereupon after hearing the charge of the Court, and under instructions from the Court, the said jury did then and there in open Court through their foreman render and deliver the following verdict, to-wit:

NEW ORLEANS, *April* 22, 1904.

We, the jury find a verdict in favor of the defendant.

(Signed) H. C. GREVIER, *Foreman.*

and the Court did then and there order the said verdict to be so recorded.

It was further ordered that counsel for the plaintiff be allowed 30 days from this date, time in which to prepare and present bills of exceptions, herein.

17 *Motion for New Trial.*

Filed April 23, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC R. R. Co.

On motion of A. E. & O. S. Livaudais, of counsel for plaintiff, and upon their suggesting to the Court, that there is error to his prejudice in the judgment rendered herein on the 22nd day of April, 1904, in favor of defendant and against your mover, and that your mover desires a new trial herein for the following reasons, to-wit:

That the said judgment is contrary to the law and the evidence; that there was error in your Honors taking the case from the jury's hands and instructing them to render a verdict in favor of the defendant, for the reason that it appeared that the injury complained of was caused by a fellow servant, whilst there was evidence of negligence attributable to the employer himself, of the sufficiency of which evidence establishing the fact that they had allowed a dangerous practice of their laborers jumping from their moving trains, the jury were the only judges, and which should have been left to be determined by the jury;

That there is further error for the reason that questions affecting the relations of masters and servants under contracts of employment in this State should be adjudicated upon in compliance with the Civil laws of this State, and that under our Civil Code all adjudications by the Courts of this State thereunder, the parties referred to in this instance are not fellow servants.

It is ordered, that the defendant do show cause on the 30th day of April, 1904, why a new trial should not be granted herein.

18 *Motion to Show Cause.*

Extract from the Minutes.

November Term, 1903.

NEW ORLEANS, SATURDAY, *April* 23, 1904.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

On motion of A. E. & O. S. Livaudais, of counsel for plaintiff, and upon their suggesting to the Court that there is error to his prejudice in the judgment rendered herein on the 22nd day of April, 1904, in favor of defendant and against your mover, and that your mover desires a new trial herein for the reasons on file.

It is ordered, that the defendant do show cause on the 30 [30th] day of April, 1904, why a new trial should not be granted herein, and that this matter be continued for hearing at the following term.

* * * * * * *

Order Restoring Case to Trial Docket.

Extract from the Minutes.

April Term, 1904.

NEW ORLEANS, THURSDAY, *June* 2, 1904.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

This cause having been heretofore argued and submitted to the Court upon the motion of plaintiff for a new trial.

19 It is now ordered for the reasons assigned in the written opinion filed this day that the case be restored to the trial docket for reargument, and the plaintiff has already presented his bill of exceptions, but it need not and will not be acted upon at present, and all of his rights thereto are preserved to await the Court's final action on the motion for a new trial.

Opinion Restoring Motion for a New Trial to the Trial Docket.

Filed June 2nd, 1904.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC R. W. Co.

PARLANGE, *District Judge:*

This matter being before me on motion for a new trial, I have carefully read the evidence and again considered the law applicable to the case. It appears from the evidence that the plaintiff and other employés of the defendant, being under the control of a foreman, boarded the "cannonball" train at Davis, in order to return to Waggaman. That the conductor intended to stop the train at Waggaman to put off the men, but that this intention was not conveyed to the plaintiff or his fellow laborers. That the plaintiff believed the train would only "slow up" at Waggaman, and that he was then to jump off. That on former occasions the plaintiff and others had jumped off at that place under the same circumstances, and knew that that particular train never stopped there, but only "slowed up" to take the mail. That while the foreman did not specifically order the plaintiff to jump off, he did tell him and the other men, "throw off your tools and let us get off," and that under the circumstances, plaintiff not having been told that the train was going to stop, may well have understood, as he says he did, that the train would only "slow up," and that he was to jump off. After the train had slackened, he jumped off and was injured.

The motion to direct a verdict for defendant was virtually based on two propositions: 1st. That the injury was caused by the plaintiff's own negligent act or a risk incident to the employment and assumed by him. 2nd. That, in any event, the injury was
20 due to or caused by the negligence of the plaintiff's fellow servants, meaning the foreman or conductor or engineer or all of them.

In R. R., *vs.* Egeland, in 163 U. S., 93, and in C. C. A. 56 F. R., 200, a case very similar to the present one, there is no intimation, that, because of a local statute, the fellow servant doctrine did not apply, and yet we find that a decision by the trial Court in favor of the plaintiff was sustained both in the Circuit Court of Appeals and in the Supreme Court. Also notice, Erie R. Co., *vs.* Moore, 113 F. R. 270.

Again, in the Am. & Eng. Ency. of Law (2nd Edn.) Verbis "Master and Servant," Vol. 20, p. 147, it is said that as a general rule, a servant is excusable for obeying an order in and about his master's business, unless the danger is so manifest that no prudent

person would attempt to obey the order. In the notes, it is stated that the rule has been applied to servants who, acting under orders, jump from moving trains, and several adjudicated cases are cited. See also same work, same Vol. at page 120, "Working under orders." Also, same work, same Vol. "Duty of master to adopt rules," page 101.

The question, therefore, is whether in the instant case, the plaintiff is debarred by the doctrine of "fellow servants," and whether the matters of contributory negligence and assumption of risk should not have been left to the jury.

The Court desires re-argument on those points, and the case will be restored to the trial docket for such purpose. The plaintiff has already presented his bill of exceptions, but it need not and will not be acted upon at present, and all of his rights thereto are preserved, to await the Court's final action on the motion for a new trial.

* * * * * * *

Order Setting Aside Verdict and Granting New Trial.

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, MONDAY, *February 6th,* 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

21 JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

This cause came on to be heard at a former day upon the rule of plaintiff for a new trial herein, and after hearing further arguments from counsel for the respective parties, the Court took the same under advisement.

On consideration thereof it is ordered that a new trial be granted herein, and that the verdict heretofore rendered in this cause be set aside.

* * * * * * *

Case Called, Names of Jurors, Hearing, and Continuance.

Extract from the Minutes.

November Term, 1905.

NEW ORLEANS, MONDAY, *March* 12, 1906.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

This cause was this day called for trial.
A. E. & O. S. Livaudais and Albert Voorhies appearing for the plaintiff; Howe, Spencer & Cocke, for the defendant.
When the following named jurors were called and sworn to well and truly try the issues joined herein, to-wit:

1. R. A. Fox.
2. A. B. Breedlove.
3. Edward Vincent.
4. Joseph Steckler.
5. T. M. Thompson.
6. Chas. J. Alleyn.
7. C. C. Baldwin.
8. Robert Spearing.
9. Thos. S. Nobles.
10. A. J. Ferrand.
11. M. E. Culligan.
12. J. P. McElroy.

when the Court appointed R. A. Fox, foreman of the Jury, and the trial was proceeded with.
22 After hearing the pleadings it was ordered by the Court that the further hearing of this cause be continued until tomorrow at 11 A. M.

Hearing and Verdict.

Extract from the Minutes.

November Term, 1905.

NEW ORLEANS, TUESDAY, *March* 13, 1906.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange, District Judge:

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

This cause as *contained* from yesterday was this day resumed, and the counsel for the respective parties as well as the jurors empanelled in the cause being all present, the trial was proceeded with.

After hearing further testimony in the cause, and the arguments of counsel for the respective parties, and receiving a charge from the Court, the jury retired to deliberate as to their verdict. After due deliberation, the jury returned into Court, and then and there in open Court, did, through their foreman, render and deliver the following verdict, to-wit:

NEW ORLEANS, LA., *March 13th*, 1906.

We, the jury find verdict in favor for plaintiff in the sum of 3,000.00 (three thousand) dollars with legal interest from date.

R. A. FOX, *Foreman.*

Whereupon on motion of counsel for defendant, it was ordered that the jury be polled, and on being in due form of law severally interrogated by the clerk, each and every juror did answer for himself that the said verdict of the jury was his true and lawful verdict in the premises.

Whereupon it was ordered that the said verdict be recorded and it is done accordingly.

It was further ordered that the said jury be discharged from further consideration of this cause.

23 *Stipulation of Counsel.*

Filed Mar. 13, 1906.

"Stipulation 1."

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

In the above entitled and numbered cause, it is hereby stipulated and agreed between the undersigned counsel for the plaintiff and defendant, respectively, that the new trial granted herein shall be had upon the testimony taken stenographically on the former trial.

(Signed) A. E. & O. S. LIVAUDAIS,
Attorneys for Plaintiff.
HOWE, SPENCER & COCKE,
Attorneys for Defendant.

New Orleans, February 23rd, 1905.

Testimony.

Filed March 13, 1906.

In the Circuit Court of the United States for the Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

Proceedings and testimony read in evidence in the above numbered and entitled cause on behalf of plaintiff, on the 13th day of March, 1906, before the Hon. Charles Parlange, judge, and a jury.

Appearances.

Albert Voorhies and A. E. Livaudais, for plaintiff.
Charles P. Cocke, for defendant.

24 Offer, Mr. COCKE:

We now file a stipulation, in writing agreeing that the trial of this case, should be had upon the testimony taken stenographically on the former trial, which said document is marked "Stipulation 1."

In accordance with said stipulation, Counsel for plaintiff now offers in evidence and proceeded to read to the Court — Jury *empanned* [empanelled] in the case, the following testimony taken on the former trial on behalf of plaintiff:

1. Testimony of Jonas S. Bourman, plaintiff herein.

2.

After the reading of the testimony had been proceeded with, counsel for plaintiff was reading to the jury the following question: "Q. Do you know that the other employees have been in the habit of jumping from the train when it slacks its speed at that particular station?"

Whereupon Mr. Cocke, counsel for defendant, objected to the above question being read to the jury, on the ground it is irrelevant, incompetent and immaterial, and neither proves nor tends to prove any issue in this case; there is no custom alleged in the petition.

NOTE.—The petition is here read by Mr. Cocke.

By the COURT: Your objection does not seem to be borne out. The Court overrules the objection.

To which ruling of the Court in overruling defendant's objection, counsel for defendant excepts and reserves a Bill of Exception.

It is understood that the foregoing objection shall apply to all other testimony of like character, without repitition.

2. The testimony of Willie Holmes.

3. The testimony of Joe Fitzhugh.
4. The testimony of Frank Smith.

After the reading of said testimony, the plaintiff rested.

25 Counsel for defendant offered in evidence and read to the Judge and Jury the testimony taken on the former trial stenographically on behalf of defendant:

1. The testimony of J. B. Paul.
2. The testimony of A. J. Wolf.
3. The testimony of S. B. Smith.
4. The testimony of W. F. Brutbacher.
5. The testimony of R. C. Strain.

Whereupon the defendant rested.

Counsel for plaintiff then proceeded to read in evidence in rebuttal the testimony of:

1. Jonas S. Bourman.
2. Willia Holmes.
3. Clara Cleveland.

Case closed.

Mr. Cocke moves the Court, in writing, to direct a verdict for the defendant.

By the COURT: I must overrule it.

By Mr. COCKE: To which ruling of the Court counsel for defendant excepts and annexes all the testimony, both oral and documentary, and other evidence.

Which request is granted by the Court.

26 *Charge of the Court.*

Delivered Tuesday, March 13th, 1906.

In the Circuit Court of the United States for the Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

PARLANGE, *J.*:

The Court refuses the seven (7) instructions asked by the plaintiff, considering that the general charge is sufficient for all the purposes of this case.

The Court refuses the seven (7) charges requested by the defendant in this case, considering that the general charge is sufficient for all the purposes of this case.

Counsel for defendant excepts and reserves separate bills of excep-

tion to the refusal of the Court to grant each one of the seven special charges requested by the defendant.

Counsel for plaintiff, being asked by the Court if they wished to reserve exception to the refusal of the Court to grant their special instructions, replied they did not wish to except to same.

GENTLEMEN OF THE JURY:

You are the only judges of the facts, of the weight of the evidence and of the credibility of witnesses. But I have a right to express an opinion on such matters, which opinion, however, is in no wise binding upon you. I am the sole judge of the law of the case and you are bound to take the law from me.

The burden is on the plaintiff Bourman to make out his case by a preponderance of credible proof. He must show that the defendant, the Texas & Pacific Railway Co., committed the fault stated in the petition or was negligent as stated in the petition and that that fault or negligence was the direct and proximate cause of the plaintiff's injury.

It was the duty of the defendant Railway Co. to use ordinary care in affording the plaintiff a reasonably safe opportunity of landing at Waggaman Station. The main question for you to decide is, did the defendant Railway Co. afford the plaintiff such an opportunity?

If the defendant did not do so and if the plaintiff did not
27 contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant Railway Co. would be liable to him for his injury.

The burden of proof is on the defendant Railway Co. to show by a preponderance of proof that the plaintiff contributed by his own negligence to his injury, that is to say, that by his negligence he helped or assisted in any way in bringing about his injury. If he did so, he cannot recover, however much the defendant Railway Co. may have been negligent.

In the same way, the burden of proof is on the defendant Railway Co. to show that the plaintiff assumed the risk of alighting as he did. If the plaintiff assumed the risk, he cannot recover, however negligent the defendant Railway Co. may have been.

I understand that it is contended for the defendant Railway Co. that the train was ordered to stop and did stop to put off the plaintiff and his fellow laborers at Waggaman. I also understand that on behalf of plaintiff it is contended that the train did not stop at Waggaman for the purpose just stated and that it only stopped after and because of the injury to plaintiff. All of that is matter exclusively within your province, as well as the matter whether or not plaintiff was told or ordered by the foreman to get off while the train was in motion.

The mere fact that the foreman would have ordered the plaintiff to get off while the train was moving (if he gave such an order) would not of itself entitle the plaintiff to recover. The plaintiff should not have obeyed such an order if it was so dangerous that an ordinarily prudent man would not have obeyed it. You would have

to consider and decide whether under all the circumstances the plaintiff (assuming the order was given) contributed to his own injury by his negligence in obeying the order or assumed the risk involved in obeying it.

But I repeat to you that it was the duty of the defendant Railway Co. to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

Therefore, if you find that the defendant Railway Co. failed in this duty, that the failure was the direct and proximate cause of plaintiff's injury; that the plaintiff did not assume the risk, and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he has suffered.

In such case, you should and must allow no vindictive or punitory damages. You must not attempt to fine or punish the defendant Railway Co. This is no case for the infliction of vindictive or
28 punitory damages. You should and must confine yourselves strictly to compensatory damages, that is to say, such a sum as would pay the plaintiff for the loss of his leg and for his physical sufferings. Diminution of his earning capacity would, of course, be an element of his damages.

You must decide this case with the strictest impartiality and without any bias in favor of or against either party.

If your verdict is for plaintiff, your foreman will write the verdict on the back of the petition, thus: "We, the jury, find for plaintiff in the sum of $——, with legal interest from date." If you find in favor of the defendant, your verdict will be: "We, the jury, find for defendant."

Your verdict must be written, dated and signed by your foreman.

Counsel for defendant excepts and reserves a bill of exception to all that portion of the charge of the Court instructing the jury: "It was the duty of the defendant Railway Company to use ordinary care in affording the plaintiff a reasonably safe opportunity of landing at Waggaman Station. The main question for you to decide is: Did the defendant Railway Company afford the plaintiff such an opportunity? If the defendant did not do so, and if the plaintiff did not contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant Railway Co. would be liable to him for his injuries." * * *

"But I repeat to you that it was the duty of the defendant Railway Co. to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

"Therefore, if you find that the defendant Railway Co. failed in this duty, that the failure was the direct and proximate cause of plaintiff's injury, that the plaintiff did not assume the risk, and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he suffered." Just one bill; this exception being taken because counsel considers the charge erroneous, and in assuming that

the plaintiff was not afforded a safe opportunity to alight. This instruction goes on the assumption that the defendant did not give him a safe opportunity to alight safely; but it was only because the plaintiff didn't give us an opportunity to do it.

By the COURT: You feel you have had full opportunity to state your reasons?

29 By Mr. COCKE: I think they are sufficient.

Counsel for plaintiff, being asked by the Court if they desired to except, stated they did not.

Juror asks permission of the Court to ask a question, which was granted by the Court.

This train when it stopped, was it three car lengths beyond the station, or three lengths beyond the train?

Mr. COCKE: I understand the testimony to be that it stopped three car lengths passed the point where this man was hurt. He was in the middle of the train; the train ran by about six car lengths in all. In other words, the rear of the car was about six car lengths from where he was.

By Mr. VOORHIES: He was right opposite the station.

Order Fixing Time to Prepare Bills.

Extract from the Minutes.

November Term, 1905.

NEW ORLEANS, *Tuesday, March 13th,* 1906.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

No. 13158.

JONAS S. BOURMAN

vs.

TEXAS & PACIFIC RAILWAY CO.

On motion of Charles P. Cocks of counsel for defendant it was ordered that he be allowed twenty (20) days from the overruling of the motion for a new trial, if overruled, within which to prepare and present his bill of exceptions taken herein.

30 *Bill of Exceptions No.* 1.

Filed *Nunc Pro Tunc* as of Date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that upon the trial of this cause before the Court and jury, on the 13th day of March, 1906, the following, and no other, evidence was offered and introduced by plaintiff and defendant, and given to the jury upon the issues presented by the pleadings:

(1) The testimony of the following named witnesses given and reduced to writing on the former trial in this cause, to-wit, on the 21st and 22nd days of April, 1905, was by stipulation of counsel introduced before and read to the jury in behalf of the plaintiff, to-wit: Testimony of Jonas S. Bourman, plaintiff herein; testimony of Willie Holmes; testimony of Joe Fitzhugh, and testimony of Frank Smith.

(2) There was offered and introduced in evidence and read to the jury in behalf of the defendant by stipulation of counsel the testimony of the following named witnesses, introduced and given to the jury in behalf of said defendant on the former trial of this cause on the 21st and 22nd days of April, 1905, and then reduced to writing, to-wit: Testimony of J. B. Paul; testimony of A. J. Wolf; testimony of S. B. Smith, and testimony of W. F. Brupbacher. Which testimony, so introduced and read to the jury in behalf of plaintiff and defendant, was as follows:

(See certificate of trial Judge and testimony ms. pages 78 to 108, inclusive.)

And thereupon, the evidence in behalf of both plaintiff and defendant being closed, counsel for defendant then and there, in the presence of the Court and jury, and before the jury had retired, moved the Court to instruct the jury to find a verdict for the defendant on the following grounds, or any one of them, to-wit:

31 That the evidence failed to show that the plaintiff's injury was due to any negligence on the part of the defendant or its employés; that even if said evidence did show any negligence on the part of the defendant's employés, then the same was the negligence of plaintiff's co-servants; that the evidence showed that plaintiff was guilty of such contributory negligence as prevented a recovery; and that in any event, the evidence showed that the plaintiff assumed the risk of injury in jumping from defendant's train under the circumstances disclosed by said evidence. Thereupon the Court declined and refused to grant said motion; to which refusal counsel for defendant then and there, in the presence of the Court and jury, and before the jury had retired, duly excepted and reserved this its bill of

exceptions. And the Court thereupon directed that all the evidence and testimony be incorporated in and made part of this bill of exception, and the Court now orders that the entire general charge of the Court be made part of this and of every other bill of exception in this cause and now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same; and said trial judge now allows this bill of exceptions, and the same is settled and signed accordingly, and ordered to be filed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 1.

Filed *Nunc Pro Tunc* as of Date March 13th, 1906.

No. 13158.

United States Circuit Court, Eastern District of Louisiana.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury,
32 the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"The burden is upon the plaintiff to prove by a preponderance of credible evidence that the plaintiff was negligent, and that its negligence was the direct cause of the injury. In order to show that the defendant's foreman, Hodnett, was negligent, the plaintiff is bound to show to your satisfaction that said Hodnett ordered him to jump from the moving train, and that he obeyed such order in reliance on said Hodnett's superior knowledge and judgment. If you do not believe from the evidence that any command to jump was given by Hodnett, or if you believe that the plaintiff in jumping from said train acted entirely on his own volition, and not because of any order given him by said Hodnett, then the plaintiff cannot recover, and your verdict must be for the defendant."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction, and to the denial of said request and to the ruling of the Court counsel for defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter

thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 3.

Filed *Nunc Pro Tunc* as of Date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on
33 the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury, the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"If you find from the evidence that the foreman, Hodnett, was negligent, as charged in the petition, and if you further find from the evidence that the plaintiff was also negligent and careless of his own safety in jumping from the moving train upon which he was being carried, and that but for such negligence and carelessness he would not have been injured, then your verdict must be for the defendant."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction; and to the denial of said request and to the ruling of the Court counsel for defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 4.

Filed *Nunc Pro Tunc* as of date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on
34 the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury, the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"If you find from the evidence that the plaintiff's injury was caused by the negligence of the foreman, Hodnett, and not by the plaintiff's own act of negligence, then I charge you that the negligence of said foreman was the negligence of the plaintiff's co-servant, the risk of which the plaintiff assumed, and your verdict must be for the defendant."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction; and to the denial of said request and to the ruling of the Court counsel for the defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 5.

Filed *Nunc Pro Tunc* as of date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and
35 refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury, the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"I charge you that a locomotive engineer has, in the absence of notice to the contrary, the right to assume, whilst handling his train, that persons being conveyed thereon will not attempt to alight while such train is in motion. If, therefore, you find from the evidence that the train which caused the injury was jerked or started forward by the engineer prior to being brought to a full stop at Waggaman Station, and just at, or prior to, the moment that the plaintiff undertook to jump therefrom, then the act of the engineer in so jerking or starting said train was not such negligence as entitled the plaintiff to recover in this case."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction; and to the denial of said request and to the ruling of the Court counsel for defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 6.

Filed *Nunc Pro Tunc* as of date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

36 Be it remembered, that on the trial of this cause, to-wit, on the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury, the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"If you find from the evidence that the plaintiff's injury was caused by the negligence of the engineer of the train on which plaintiff was being transported, and not by the plaintiff's own act of negligence, then I charge you that the negligence of said engineer was the negligence of the plaintiff's co-servant, the risk of which the plaintiff assumed, and your verdict must be for the defendant."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction; and to the denial of said request and to the ruling of the Court counsel for defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same; and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 7.

Filed *Nunc Pro Tunc* as of Date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on
37 the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury, the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"The risk of jumping from a train moving at a speed of from eight to ten miles an hour is a clear and obvious one, and if you find from the evidence that the plaintiff undertook to jump from a train moving at that rate of speed and was injured thereby, then he was negligent in so doing, even if ordered by Hodnett to do so, and cannot recover in this case for such injury."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction; and to the denial of said request and to the ruling of the Court counsel for defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bill of Exception No. 8.

Filed *Nunc Pro Tunc* as of Date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on
38 the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court having announced its purpose to charge the jury, the defendant did thereupon, in the presence of the jury, request and move the Court to give to the jury the following special instruction or charge, to-wit:

"If you find from the evidence that the employés in charge of trains of the defendant upon which plaintiff or other laborers employed by the defendant were from time to time transported from or to their places of work, were in the habit of merely slacking the speed of said trains instead of stopping them at Waggaman or other points at which said plaintiff or other employés were expected to alight; and if you further find from the evidence that the plaintiff was aware of such practice at the time of the accident and undertook to alight from the train on which he was being transported while same was in motion, and was hurt, then I charge you that the plaintiff assumed the risk of injury incident to such attempt, and cannot recover in this case."

But the Court then and there, in the presence of the jury, refused to give the jury said instruction; and to the denial of said request and to the ruling of the Court counsel for defendant then and there, in the presence of the jury, excepted and reserved this its bill of exceptions, which was then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of date the 13th day of March, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

39 *Bill of Exception No. 9.*

Filed *Nunc Pro Tunc* as of Date March 13th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Be it remembered, that on the trial of this cause, to-wit, on the 13th day of March, 1906, and after the motion of defendant's counsel to direct a verdict for the defendant had been overruled and refused, as set forth in defendant's bill of exception No. 1 (all of the evidence and testimony annexed to said bill of exception No. 1, being the whole of the evidence in the cause, being now made part hereof), the Court proceeding to charge the jury, instructed them as follows:

"It was the duty of the defendant Railway Company to use ordinary care in affording the plaintiff a reasonably safe opportunity of landing at Waggaman Station. The main question for you to decide is: Did the defendant Railway Co. afford the plaintiff such an opportunity? If the defendant did not do so, and if the plaintiff did not contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant Railway Co. would be liable to him for his injuries. * * *

"But I repeat to you that it was the duty of the defendant Railway Co. to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

"Therefore, if you find that the defendant Railway Co. failed in this duty, that the failure was the direct and proximate cause of plaintiff's injury, that the plaintiff did not assume the risk, and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he suffered."

To which charge so given counsel for defendant then and there, in open Court, in the presence of the jury, excepted on the ground that said charge was erroneous and assumed that the defendant did not afford the plaintiff a safe opportunity of alighting at Waggaman Station, and reserve this its bill of exceptions, which was
40 then and there noted to the end that the matter thereof might be put of record; and the trial Judge now certifies that the same was duly and seasonably presented to the Court within the time duly fixed by the Court for presenting the same, and the same is now settled and signed *nunc pro tunc* as of March 13, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

The trial Judge now certifies that the following thirty pages contain all the testimony in this cause and orders same to be incorporated in and made part of bill of exception No. 1. *Nunc pro tunc* as of March 13, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

* * * * * * *

United States Circuit Court, Eastern District of Louisiana.

No. 13156.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

NEW ORLEANS, LA., *April 21st*, 1904.

The Court met this day pursuant to adjournment.

Present: His Honor Charles Parlange, Judge, with a jury. A. E. & O. S. Livaudais, Esqrs., for the plaintiff. Howe, Spencer & Cocke, Esqrs., for the defendant.

And the jury having been empanelled, and the pleadings read:

JONAS S. BOURMAN, plaintiff sworn on his own behalf, says:

By Mr. LIVAUDAIS:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. Where were you—what was your occupation in the latter part of December 1901?
A. The railway.
Q. For what company?
A. The Texas & Pacific Railway Company.
Q. How did you happen to go into their employ? Who employed you to go to work for that company?
41 A. The railroad foreman.
Q. What is his name?
A. Willie Hadnott.
Q. Did he tell you how much you were to receive a day?
A. Yes, sir.
Q. Who kept your time whilst you were working for that company?
A. The foreman took the time every day and brought it to the office every night.
Q. Which foreman, Hadnott?
A. Yes, sir; that was the only foreman that was on the section.
Q. When were you paid and how were you paid?
A. How did we get paid?
Q. Yes; how were you paid?
A. You mean how did we get paid on the road?
Q. How did you get paid, once a month?

A. We got paid every 20th of the month.
Q. Whom did you get the money from?
A. From the pay car; we got a check from the pay car and could cash it out at the store.
Q. Had Hadnott engaged any other laborers but you, to your knowledge?
A. No, sir; he has not engaged any more besides myself; he did not hire any men on the track besides me.
Q. Did he hire any more men?
A. Yes, sir; he did.
Q. You know that he kept the time of all the men that he kept hired?
A. Yes, sir; he kept the time of all the men who was running that section.
Q. And you were all paid at the same time?
A. Yes, sir; we got all paid off the pay car.
Q. Did Hadnott discharge any one that you know?
A. Yes, sir; he has discharged.
Q. You know that he has discharged people?
A. If I know that?
Q. Yes?
A. Yes, sir; I know he did.
Q. Tell us what took place in the first day of December, 1901?
A. Yes, sir; very well; the first of December I was on the section, and the foreman came out at the depot——
Q. Do not make it too long, just state what you did?
A. The first of December we were called out to a wreck,
42 five miles above the nearest section he was living on, that was Davis. We were taken out on the wreck train and worked all that day, Thursday, and worked on the wreck train all that night.
Q. What became of the wrecking train?
A. The wrecking train left between 8 and 9 o'clock that night, and the foreman told me: "You take your boys down to the section to old man Dan Hancock; that was the section above us.
Q. And instead of that——
A. He did not take us; not any handcar at all. We loaded up the through freight, that was on the track that night; then the cannon ball came along that night, and came in on the side track.
Q. Is that cannon ball train known as the train No. 52?
A. Yes, sir; No. 52, that is the cannon ball.
Q. Why did not she stop at that station?
A. The through freight was on the main line; she did not go to the station; she pulled on the side track, she was not at the station at all.
Q. Was Davis station a regular station?
A. No, sir; a flag station.
Q. Does the cannon ball generally stop there?
A. No, sir.
Q. Well, now, after the cannon ball was stopping there, what took place after?

A. What made us stop there?
Q. Yes?
A. There was a through freight on the main line, so she had to pull on the side track, while we were out on that wreck train.
Q. How did you happen to leave that train?
A. When the through freight pulled out, Hadnott said: "Boys there is nothing else for us to do, get your tools and let us go home. Just like that.
Q. You were going to Waggaman?
A. Yes, sir; we were going to Waggaman on our own section.
Q. Is Waggaman a regular station?
A. Yes, sir.
Q. Does the car stop regularly there all the time?
A. The cars stopped there outside of this cannon ball.
Q. I am speaking about this cannon ball?
A. No, sir; she makes no regular stop; only slacks up.
Q. Does she carry the mail?
A. Yes, sir.
43 Q. How is the change of mail made at that station?
A. The operator man is standing up with the mail bag in his hand, and he has to throw it into the coach.
Q. Then cannon ball then does slack for that?
A. Yes, sir; the cannon ball slacks at the station for them to do so.
Q. Do you see the cannon ball slacken up there regularly?
A. Yes, sir.
Q. Who boarded the train No. 52 with you at Davis station, after that wreck?
A. Willie Holmes, C. B. Larson and Harry Hadnott.
Q. Who else?
A. That was all, only the four laboring men on that station.
Q. When you went into that train; what portion of the train did you go to? Did you go inside the coach?
A. No, sir.
Q. What did you do?
A. We had our tools in our hands and stood on the platform.
Q. What is the distance between Davis station and Waggaman?
A. I think it is five miles, I think.
Q. You stood all that time on the platform?
A. Yes, sir.
Q. Did the train not blow for the station at Waggaman?
A. Yes, sir; she blew for the station.
Q. How did she blow?
A. She blowed one long whistle and one short whistle.
Q. What did you do, then, when you heard that?
A. When she blew for the station we all got on the steps, with our tools in our hands.
Q. You moved down the steps?
A. Yes, sir; she was slacken- up speed.
Q. She was slacking up speed?
A. Yes, sir.
Q. On what step were you standing?

A. I was standing on the step right in front of the white coaches.
Q. I say on what step of the ladder?
A. The last one downstairs?
Q. What made you get there?
A. Well, that was the way to get off when we was to get off at the depot.

Q. How did you happen to leave that position; you know
44 you were standing on the steps; were you holding on to anybody?

A. Yes, sir; holding on to the rod of the step.
Q. What made you lose that position; standing on the last step, holding the rod, what made you lose that position?
A. What made me lose that position?
Q. Yes?
A. To get off the train when she drew up at the depot.
Q. What happened immediately when you started to go off the train?
A. The foreman said: "Boys, throw your tools off, and let us get off." That was before she got to the station; and when she slacked up, she slacked up slow enough for anybody to get off, and when I went to get off she jerked; and I grabbed, and the engineer put more speed to the engine, and that threw me down and I could not let go, and she dragged me along until I got weak in the arms, and let go and tore my arm.
Q. What was the cause of that jerking manner; you say she was running slow?
A. She was running slow and she slacked up speed, and then she let go again and she made a jerk.
Q. That was what you meant; she started off and increased her speed?
A. Yes, sir; after she slacked she started up again.
Q. When you fell—what were you holding to when you fell?
A. I was holding to the rod on the step.
Q. How long was it that you held that rod after you fell?
A. I cannot say how long I held it, but I held it until I lost my grip and could not hold it any more; it was dragging me.
Q. What became of you after you fell?
A. What became of me after?
Q. Yes?
A. The train backed up there and took me here and put me in the Charity Hospital; at the time I got hurt; the operator man was standing out with his baggage in his hand, and he was the man that grabbed me when I fell, from going under, and the wheel run over my leg and mashed it.
Q. What injury did you sustain; what damage did you sustain? Did the cars passed over you?
A. Yes, sir; the wheel rolled over my leg and mashed it; the conductor halloed to the engineer to back up the train; he said, "Come here, back up this train." He said it in bad language, when he told him to back up the train; he said——

45 Mr. Cocke, for the defendant, objects to the witness stating what the conductor said, as hearsay.

Q. What became of you after you were picked up?
A. He halloed to the engineer to back up the train. He said, "He ought to be satisfied——
Q. What became of you afterwards, after they picked you up?
A. They took me to the Charity Hospital.
Q. What was done with you at the Charity Hospital?
A. Well, nothing at all; I went up to the section again.
Q. Did you suffer much from the effects of the wound?
A. Yes, sir; indeed I did.
Q. Would you go through that experience again for five thousand dollars?
A. No, sir; I would not like to go through that suffering any more for no kind of money.
Q. But the law says you must put a figure, because you cannot sue for suffering unless you put a valuation on it; do you think five thousand dollars a fair valuation for the suffering you had?
A. Would pay for the suffering I had?
Q. Yes, for the suffering you had, your leg being crushed and amputated?
A. W[illegible], I say I would not like to pass through that for no money.
Q. Do you think five thousand dollars would be reasonable?
A. Well, I think it would be reasonable enough; but I would not like to pass through that suffering any more for all that money or any other money.
Q. You were an able-bodied man at the time, in good health—at the time your leg was hurt?
A. Yes, sir.
Q. How old are you, 20 or 22?
A. No, sir; I was about 20 years old.
Q. Do you consider that five thousand dollars is compensation for all that you have lost of the possibilities of life, for being made a cripple all your life; do you think five thousand dollars is a fair compensation?
A. Well, I consider it a very reasonable price, but, then, I would not like to pass through it any more, though.
Q. Now, when you boarded the train 52 at Davis station, did the conductor, the engineer or any other railroad officer see you on board that train?
A. Yes, sir.
46 Q. Are you positive of that?
A. Am I positive that they seen me?
Q. Yes? Are you positive that they knew that these section men were taking the train?
A. Yes, sir.
Q. After you were on board and standing on that platform, did the conductor or the brakeman or any other employé of the railroad company see you standing on that platform?
A. Yes, sir; saw me standing on that platform.

Q. Are you positive of that?
A. Yes, sir.
Q. Do you know that the other employés have been in the habit of jumping from the train when it slacks its speed at that particular station?

Mr. Cocke, for the defendant, objects to the above inquiry, on the ground that it is irrelevant, incompetent and immaterial and neither proves nor tends to prove any issue in this case. And he also objects, that the question is leading.

The Court inquires of Mr. Livaudais the purpose of this testimony.

Mr. LIVAUDAIS: My principal object is to establish, if I can, that this company had established a dangerous practice of jumping off trains; that this thing had been done before to the knowledge of the defendant, and, of course, if they have permitted such a thing as that, it is precedent. If it is negligence at all, it attaches to the fact of jumping from a car going at slow speed; that negligence is the defendant's.

Mr. COCKE: A clear case is made by the pleadings here. The defendant is charged with negligence in that its foreman ordered this man to jump from a train. I do not understand that any custom is considered alleged, or that there is such an issue in this case at all. If it was, it would be perfectly void and highly unreasonable. I do not think that an order of a subordinate employé of the defendant company can establish a custom of the company that would be binding and that would obligate a man to jump from the top of a moving train, or from any other place he might be ordered to jump from.

47 The COURT: It seems to me the evidence ought to go in. What the result of the whole thing will be, I cannot say.

Mr. Cocke, for the defendant, reserves exception. And this exception is to apply to all the testimony of a similar character.

Q. Do you know whether any other has been in the habit of doing that at that particular station?
A. Yes, sir; I know it is.
Q. Do you know that it was so?
A. If I know one?
Q. Do you know if it was the custom for employés traveling, coming back from a wreck, or any other position, traveling, to stop at this particular station, and in passing it to jump whilst the train had slackened its speed?
A. Yes, sir; I know.
Q. Had you seen it done?
A. Yes, sir; I had seen it done.

Cross-examined.

By Mr. COCKE:

Q. You say that you were employed by Mr. Hadnott, and that you were located at Waggaman station?
A. Yes, sir.

Q. There was a sort of boarding camp kept there by the railroad company that you lived there and that the company furnished you quarters?

A. Yes, sir; I lived on the section.

Q. The company had a house for you?

A. Yes, sir.

Q. You had been up, on the day you were hurt, or the day before you were hurt, at Davis station?

A. The day before I was hurt?

Q. Yes? Or was it the same day?

A. It was the same day I went up there the first of December I went to Davis.

Q. You went up to Davis?

A. Yes, sir.

Q. And you were being brought back to Waggaman station?

A. Yes, sir.

Q. You stated that Willie Holmes was one of the men that was with you? Do you see him here in Court?

A. Yes, sir; he is here now.

48 Q. You say you were standing on the last step of this car, at the time you were hurt?

A. Yes, sir.

Q. Who was standing above you?

A. Harry Hadnott.

Q. Who was above him?

A. I do not know where the others were.

Q. Where were the others?

A. The next, the adjoining step.

Q. You say you were talking to Hednott?

A. I was talking to Hednott.

Q. Were you not talking to Hednott before you were hurt?

A. We were all there talking.

Q. Were you talking to him?

A. No, sir; not to him, personally.

Q. Did he speak to you?

A. No, sir; he did not.

Q. He said nothing to you at all?

A. When we were on the way coming, we were all speaking, but when the train slacked up—when they blew the whistle for the train to stop at the depot, he told us, "Boys, get your tools, we will get off."

Q. That was while she was slacking up?

A. Yes, sir.

Q. You say that you jumped when the train slowed at the depot?

A. Yes, sir.

Q. That was before it stopped?

A. She was not going to stop there at all.

Q. You did not know that, that is, before she stopped?

A. Well, she did not stop at all.

Q. You jumped while the train was moving?

A. Yes, sir.

Q. Then you say that the train started up suddenly?

A. Yes, sir; at the time I was getting off, she jerked before I jumped loose.

Q. Do you think it would have been the same, that you would have been hurt if the train had not started again?

A. No, sir; I do not think it would.

Q. How much were you getting a month from the railroad company?

A. I cannot say exactly what I was getting.

Q. How much a day?

A. A dollar and fifteen cents a day.

Q. How long had you been working for that?

49 A. I was working down at that section for about five months.

Q. What did you do before you went with them?

A. What did I do?

Q. Before you went to work for the railroad company, what was your employment?

A. All kinds of work.

Q. How much a day did you earn, about?

A. Well, I made a dollar and a half a day, and sometimes two dollars, at the swamp, a day.

Q. That would be a fair average of a dollar and a half a day?

A. On the railroad?

Q. No, at what you were doing before the railroad?

A. Well, I made a dollar and a half, and sometimes more.

Q. When you were sent away from Waggaman station, either to handle wrecks or for other purposes, how did you usually get back to Waggaman; by a handcar?

A. No, sir.

Q. How?

A. We came back on the train.

Q. What train?

A. We used to come back on the 11 o'clock train, or by the 52, cannon ball.

Q. You usually did that?

A. Yes, sir.

CLARA CLEVELAND, sworn for the plaintiff, says:

By Mr. LIVAUDAIS:

Q. Do you know Jonas Boarman?

A. Yes, sir.

Q. Where were you and what were you doing on the first day of December, 1901, the date of this occurrence?

A. What was I doing?

Q. Yes; what were you doing the day of this accident; where were you?

A. I was fixing breakfast.

Q. Where were you?

A. Standing up by the door.

Q. At what place?

A. At the section house.
Q. Where was the section house; what station do you call it?
50 A. We call it Waggaman.
Q. Did you see anything about that accident?
A. I saw Jonas standing on the steps.
Q. Tell me yes or no. Did you see anything about that accident?
A. Yes, sir.
Q. What had you been doing that morning, that day?
A. What had I been doing?
Q. Yes, just before that?
A. Fixing breakfast for them.
Q. For whom were you fixing breakfast?
A. For Jonas Bourman and Willie Holmes.
Q. Who was Willie Holmes?
A. He used to be my husband.
Q. Where were you standing at the moment of the accident?
A. I was standing in the door.
Q. At the door?
A. Yes, sir.
Q. What door?
A. At the section door.
Q. How far is that from the place where the accident took place?
A. Well, I guess it was about as far as from here to out there at the steps.
Q. When did you see Jonas Bourman first?
A. He was standing on the steps when I seen him first, with two buckets in his hands.
Q. What became of him?
A. When he hit the track I saw him jump off.
Q. At what?
A. He held to the step ladder until he got up close to the depot, when I seen him fall.
Q. What happen- to him when he fell?
A. He got crippled; when I runned out there, I saw he was trying to get up, and his leg was mashed down.
Q. What became of the train after it run over Bourman's leg?
A. After it run over him, it runned about from here as far as the door there; and the conductor was coming towards Jonas; and when he got to Jonas he stood by him and he said, "Back up I told you I would give you the signal that I had passengers."
Q. That was the conductor speaking?
A. Yes, sir.
51 Q. To whom was he speaking?
A. He must have been speaking to the engineer.
Q. And he told him, "I told you——
A. Yes, sir, "I told you I would give you the signal I had passengers."
Q. That is all he said?
A. That is all I heard him say.

Q. What made you prepare their breakfast that day; were you expecting them back?
A. Yes, sir.
Q. Did you guess or reason with yourself that they would come back on that train 52?
A. That was the only train I saw them come back on, outside of 52 and the 11 o'clock.
Q. Is that station a regular station?
A. Yes, sir.
Q. Does the train stop there every time?
A. 52?
Q. Yes?
A. She slows up to take the mail.
Q. You know that?
A. Yes, sir.
Q. Did she slow up to take the mail that time?
A. It looks like to me she slowed up.
Q. Did your husband, or Bourman, or either one of them, before, to your knowledge alight from that train in that same way?
A. No, sir.
Q. How is the mail exchanged there?
A. Sir?
Q. How do they change the mail there?
A. They throw it on her when she be passing.
Q. Did you see Bourman when he jumped?
A. Yes, sir.
Q. And you saw him when he fell?
A. Yes, sir.
Q. How far did he cling to the side of the step, as you say, before he fell?
A. He held to the step until he fell.
Q. And it was when he fell that you thought that?
A. Yes, sir.

Cross-examined.

By Mr. COCKE:

Q. You say you were about as far away from Jones as these steps; that is about twice the length of this room?
A. I cannot say.
52 Q. Do you not think it was about twice the length of this room?
A. About twice?
Q. Yes?
A. Of this room?
Q. Yes?
A. You mean in wideness?
Q. No; from here to here is the length of this room? What steps are you talking about?
A. Out there to the other steps; I guess it was that far.
Q. Where were you when the train stopped?
A. I was there at the depot when it stopped.

Q. Did it stop right at the depot?
A. No, sir.
Q. How much beyond?
A. She stopped about as far as from here to that door.
Q. How far from the depot was Jonas when he was hurt?
A. He was right at the depot.
Q. Right at the depot?
A. Yes, sir; right at the depot.
Q. So the train was about a car and a half, or two cars' length, from the depot when she stopped?
A. Yes, sir.
Q. Whom was the first man that got off that train after Jonas?
A. I do not know, to see that.
Q. You do not recollect that; do you know Mr. Hadnott by sight?
A. Yes, sir.
Q. Was he the next one got off after Jonas, or was it Willie Holmes?
A. I do not know.

WILLIE HOLMES, sworn for the plaintiff, says:

By Mr. LIVAUDAIS:

Q. Where were you living in December, 1901?
A. Where was I living?
Q. Yes?
A. At Waggaman.
Q. In what employ were you; what were you doing?
A. Section laborer.
Q. For what company?
A. The Texas & Pacific.
53 Q. Who else was employed on that section besides yourself?
A. There was Jonas Bourman, Harry Hadnott and Bill Larson.
Q. Who had hired them to work on that section?
A. William Hadnott.
Q. What was his capacity?
A. Section foreman.
Q. Did he tell you how much he would pay you when he hired you, or how much you would get per day?
A. Yes, sir; in case you did not know, you asked him, and he would tell you.

Counsel for defendant admits that the foreman, Hadnott, had the power to hire and discharge the section laborers.

Q. Where were you at the moment of the accident?
A. At the moment of the accident when he jumped off the train?
Q. Yes, where were you?
A. When he left the train I was on the inside, but when he fell I was on the outside.
Q. Did you see him fall?
A. I saw him when he fell, yes, sir.
Q. Did you see him when he jumped?

A. No, sir; I did not.
Q. Did you hear what the foreman said to Jonas, "Throw your tools out and jump"?

Mr. Cocke, for the defendant, objects to this manner of examination.

Q. Did the foreman say anything, or give any instructions to the men standing on the platform?
A. I was not there.
Q. Where were you?
A. Inside.
Q. What was you doing inside?
A. I was sitting down.
Q. Where were the others?
A. The other boys; they were on the platform and on the steps.
Q. Now, whilst you were on the inside and the other boys were on the platform, as you say, did any of the officials on board that train see you, as you were on the platform; did the conductor see you in the car?
54 A. I do not know; I do not remember seeing him, I might, but while I was inside there, I did follow him and Bill Larson —we were talking about going to town, and I went on the inside; but when the train slowed I grabbed my tools to get off the train, and threw them on this side, and I was on the other side, and when he jumped I did not get to see him when he made his jump, but when he fell, I saw him, when he left the train.
Q. Had you been jumping from that train before?
A. Well, I did jump from that train before, but it was under no "compellment" I had jumped once before to get off.

Cross-examined.

By Mr. COCKE:

Q. Did not your foreman tell you men in his charge that you were not to jump from that train?
A. Not to jump?
Q. Yes?
A. All the word that I heard him speak of, not to—after this boy was off on the ground—when I came out, he had hold of his brother by the shoulder, and he said, "do not jump off;" he had hold of his brother by the shoulder at that time.
Q. Who?
A. Mr. Hadnott.
Q. There was another Hadnott there also?
A. That was his brother Harry.
Q. He told him not to jump?
A. Yes, sir.
Q. Did he not tell you all not to jump; did he not tell you before that time, not to jump?
A. When we got on the train this is what he replied to us, "This is our chance to get down; we will go down and get off right."

Q. Did he not tell you at some place between Davis and Waggaman, that you were not to jump from that train?

A. I do not remember that he told the boys on the outside.

Q. You say you do not remember?

A. No, sir.

Q. You made a statement in writing about this, soon after the accident, to the Texas & Pacific Railway Co., do you remember signing a statement?

A. Yes, sir; I remember signing a statement, but the statement was made—I do not know what was in it, you understand,
55 as my foreman, I was new under him; I did not see anybody get hurt before, and knew nothing of the kind of the company before that. He said, "This statement must be signed by you boys," so it will go on to New Orleans.

Q. Was not that statement read to you?

A. No, sir.

Q. Then I will not use it. You do not remember whether he gave you instructions about jumping or not?

A. No, sir.

Q. How far from the spot where Jonas jumped was it to the spot where this train stopped?

A. I cannot say exactly, because I do not know.

Q. How long after he jumped did you get out?

A. That I came on the outside of the train?

Q. No, when you got out of the train?

A. When I got out of the train? He was hurt then, the train had stopped, you understand, then I got out and came up to where the crowd was.

Q. How far was the place where you got out of the train, to the place where Jonas was hurt?

A. Well, near—to my knowledge I cannot tell you, it might have been about three car lengths.

Q. So that the train must have been going pretty slowly, when Jonas jumped?

A. Well, it slacked up all right.

Q. Well, it was not going fast; it stopped right at once?

A. Not stopped, but it slowed as it did every morning.

Q. But I mean it stopped after he was hurt, a very short time after he was hurt?

A. Yes, sir; after he was hurt.

Q. It stopped within three car lengths of where he was hurt?

A. Yes, sir; it may be a little further.

Q. Do you know how long a car length is?

A. Yes sir.

Q. About how long?

A. A car length is about 60 or 64 feet.

Q. You had better figure that out again, had you not; is it not between 35 and 40 feet?

A. They are most of them the same length.

Q. Most of them are well, was it not about 35 or 40 feet?

A. Well, I do not know how much it was, but it was about three car lengths.

56 By Mr. LAVAUDAIS:

Q. You say three car lengths; what do you mean; that the end of the car was three car lengths from the place where this man was hurt?

A. To the end of the rear car?

Q. Yes, of course; I mean the rear end; what was the length of the train; how many cars did she have?

A. I do not know.

Q. How many cars has that train, generally; on that occasion how many cars did that train have?

A. She generally carries six.

Q. Six?

A. Yes, sir.

Q. Where is the location of the colored coach on that train; is it the first or the last one on that train?

A. No, sir; it is the first passenger car, they have got a baggage in front of it, between it and the engine.

Q. You say this train generally carries how many coaches?

A. If I do not make a mistake, it is six.

Q. And the cars stopped at the distance of three car lengths from where he was hurt?

A. About that, as near as I can say.

Q. You heard the foreman say, "Do not jump;" who was he speaking to?

A. He had his hand on his brother's shoulder.

Q. Where was his brother?

A. His brother was the next step to Bourman.

Q. The next step to where Bourman was?

A. Yes, sir.

Q. At what moment was it that he told his brother not to jump?

A. What moment?

Q. Yes?

A. That was when this boy was off, running along holding to the train.

By Mr. COCKE:

Q. Did you understand that you were compelled to jump from that train?

A. Compelled?

Q. Yes?

A. Not compelled, I don't think.

Q. Did anybody make you jump, or tell you that you had to jump; or did you expect to get off that train in the regular way?

A. Well, I expected to get off as the rest of them got off?

57 JOE FITZHUGH, sworn for the plaintiff, says:

By Mr. LAVAUDAIS:

Q. Where do you live?
A. At Waggaman.
Q. Where were you on the 2nd day of December, 1901, when this accident took place?
A. I was at the depot.
Q. What were you doing there?
A. Walking around.
Q. What brought you there?
A. Just walking, and stopped at the depot against this train was coming.
Q. You saw that train coming?
A. Yes, sir.
Q. What else did you see?
A. I was standing there; I did not see Jonas when he jumped off, but I saw when the train was dragging him; I never saw him jump off.
Q. What became of him?
A. The operator pulled him out and I came back and looked at him, and then the train backed up and stopped.
Q. How did the train happen to back up?
[A.] They gave him the signal to back up after they hurt him, Jonas.
Q. Who gave the signal?
A. The conductor.
Q. Did the conductor make any statement in your presence there; did the conductor say anything about the accident?
A. I never heard him then, where I was.
Q. How long have you been living at Waggaman?
A. I was born and raised in Waggaman.
Q. Does the train 52 generally stop at Waggaman Station?
A. No, sir.
Q. How far did the car run after this boy was run over?
A. That I cannot exactly say.
Q. Well, about—before it stopped?
A. Before it stopped—she didn't never stop, she just slowed up, and they catch the mail and went on off again.
Q. But that particular day, after the boy was run over, did the train stop after the accident?
A. Yes, sir; backed up.
Q. How far did she run before she backed up?
A. Well, she did not run very far.
Q. You have no idea of the distance, between the place she stopped and the spot where that boy was struck?
58 A. No, sir; I cannot say.
Q. Can you say about how many blocks, or how many steps?
A. No, sir; I could not say that, I have no idea.

FRANK SMITH, sworn for the plaintiff, says:

By Mr. LIVAUDAIS:

Q. Where do you live?
A. At Waggaman.
Q. Where were you on the second day of December, 1901?
A. I was walking, coming down towards the depot.
Q. Were you at the depot?
A. I was at the depot that morning.
Q. Were you at the depot when the train arrived there?
A. I was at the train that morning.
Q. Were you there when train 52 arrived at the depot?
A. Just walking about.
Q. Did you see anything happen Jonas on that train?
A. He was standing on the steps for to get off, on the second steps, and then when she began to slow up to get the mail he got on the bottom step, and then when he fell, why I see him fall and I turn my back; I did not see how he got hurt until I came back towards the platform.
Q. What became of the train after the boy got run over?
A. I never noticed; I turned my back, after he got off the train; I turned my back to go back to the depot; I could not tell you that to save my soul.
Q. You saw when the train backed up and took him on board?
A. No sir; I had done gone back up the road, and never noticed them and came back behind the section house, or the depot, at least.

The plaintiff here rests his case.

Whereupon Mr. Cocke, on behalf of the defendant, moves the Court for the direction of a verdict on behalf of the defendant company on the evidence submitted.

The Court denied the motion and reserves exception to the defendant.

Adjourned.

59 NEW ORLEANS, LA., *April 22nd*, 1904.

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

The Court met this day pursuant to adjournment.

Present: His Honor Charles Parlange, Judge with a jury. All of counsel in attendance.

Mr. Cocke for the defendant now asks leave of the Court to file a supplemental answer, as to the charge evoked by the evidence of a custom established by the defendant company of permitting persons to alight from its trains, while in motion.

Mr. Livaudais for the plaintiff objects to the filing of such supple-

mental answer on the ground that it comes too late, the plaintiff having already submitted his case.

Objection overruled.

J. B. PAUL, sworn for the defendant, says:

By Mr. COCKE:

Q. You reside in the City of New Orleans?

A. I do.

Q. What connection if any have you with the Texas & Pacific Railway Co.?

A. I am division superintendent of the lines in Louisiana.

Q. What is the extent of your jurisdiction, and the character of the duties of your office in Louisiana?

A. I have charge of all the employees in my division, a general supervision over them.

Q. Does your division include Waggaman and its station?

A. Yes, sir.

Q. Is it not also your duty to make proper provision for the safety of your employees, and prescribe rules for that purpose, when necessary?

A. Yes, sir; it is.

Q. Who is your immediate superior?

A. My immediate superior is Mr. J. W. Everman, who resides in Dallas, Texas.

Q. And who is his superior?

A. Mr. L. S. Thorne.

Q. Where does he reside?

A. In Dallas.

Q. Do they reside in Dallas, permanently?

A. Yes, sir.

60 Q. This is a suit by Jonas S. Bourman for damages alleged to have been sustained by him at Waggaman, in December, 1901, and he states that a uniform custom exists, whereby trains, transporting employees to and from their places of work, were accustomed merely to slack their speed approaching stations where the employees were to get out and alight, and that the employees would have to alight while the train was in motion. Will you please state whether you have ever had any knowledge of such a custom.

A. I never heard of it before.

Q. Will you please state what your duties would have been as division superintendent in case you had known of engineers and conductors and any other officers, forcing their men in jumping from trains while in motion?

A. I would have relieved from duty any such man in the service for such conduct.

Q. What is the duty of engineers and conductors and other men in charge of laborers, in respect to their alighting from trains, in regard to stopping the train?

A. In regard to every conductor, his duty is to stop the train.

Q. Is he not supposed always to bring the train to a stop before allowing passengers to alight?

A. Yes, sir; before allowing them to alight, to bring the train to a stop.

Q. And you would consider that a breach of duty to allow passengers to alight from a moving train?

A. I would not allow anything of the kind.

Q. You remember W. J. Hadnette do you not?

A. Yes, sir.

Q. He was foreman of a gang, was he not, the gang in which this man Bourman was employed?

A. Yes, sir; one of our foremen.

Q. What was his duty as foreman?

A. He took supervision over his gang, and was supposed to perform his duties correctly.

Q. You know the section gang of laborers at the quarters at Waggaman, do you not?

A. Yes, sir.

Q. And that Hodnett was in charge of those quarters?

A. Yes, sir.

Cross-examined.

By Mr. LIVAUDAIS:

Q. Where do you reside?

61 A. In New Orleans.

Q. Where?

A. I reside in this city.

Q. How often did you visit Waggaman in the latter part of the year 1901?

A. How often did I visit Waggaman? I do not remember the exact visits I paid there, but I passed through that section on an average of once a week.

Q. How often were you at that station when the trains brought passengers—to that particular station?

A. About as often as once a week, I passed through there on the train.

Q. You passed through?

A. Yes, sir.

Q. Could not that custom of jumping off trains be established by your foreman without you knowing it?

A. No, sir; not to any great *entent* [extent]; I am on the road too often to let anything of that kind go too far, without discovering it personally.

Q. You would have known of a case if it was reported to you, you mean?

A. I would have known of it?

Q. Yes, how could you have known of such a custom, except it had been reported to you?

A. I would be apt to have noticed it myself, and then it certainly would have been reported to me, if I was not present; whenever anything of that kind occurred, it would be reported to me by some one.

Q. Then if a case was reported to you you think it would be your duty to discharge the foreman?

A. Yes, sir.

By Mr. COCKE:

Q. In other words, Mr. Paul, when you say you were over that division once a week, you mean you were there on the active duty of inspection?

A. Yes, sir.

Q. And you are keeping your eyes open for anything that is improper, or which needs attention, or correction, when on your inspection?

A. That is the principal part of my duties; yes, sir.

Q. You have nothing to do then with questions of traffic matters?

A. No, sir.

Q. You attend to the actual transportation of the freight?

62 A. Yes, sir; to the actual transportation of the freight and passengers.

Q. And you have nothing to do with traffic matters?

A. No, sir.

A. J. WOLF, sworn for the defendant, says:

By Mr. COCKE:

Q. Where do you live?

A. New Orleans.

Q. What is your connection, if any, with the Texas & Pacific Railway Co.?

A. A passenger train conductor.

Q. What position did you occupy on the 2nd of December, 1901?

A. I was a passenger conductor.

Q. Of what train were you in charge?

A. Right now, I do not know.

Q. What was the number of the train, do you remember?

A. I cannot say the number of that train.

Q. Was it not No. 52?

A. Well, I cannot say that I was on that train that day; I do not recollect the dates of the trains I was on.

Q. Do you remember Jonas Bourman being hurt?

A. That would be a matter of the train I was on; I was on the train by which this man Bourman was injured.

Q. What position had you, in connection with that train?

A. Conductor.

Q. Who was your engineer?

A. S. D. Smith.

Q. Is that man in the courtroom?

A. Yes, sir.

Q. Please describe how you came to take this section foreman and this gang of laborers on at Davis Station?

A. Well, Waggaman is not a stopping place for my train; we only slow up for the mail; I had stopped at Davis. They had some freight train there, and while waiting for the freight train to pass me, the foreman came to me and told me that they had been up there wrecking two or three days, some cars off the track, that they were there, as he said, without a handcar, and that they were worn out and tired

and hungry and wanted to get to Waggaman to get something to eat. In cases of accident we have authority to take up those men and put them off, and he wanted to know if I would stop and put
63 off, or let his men get off at Waggaman, himself and his men with their tools, and I told him I would.

Q. Then they got on the train?

A. Yes, sir.

Q. What instructions, if any, did you give your engineer with regard to stopping?

A. I went to the engineer and told him that I had taken those men on board, and told him I would put them off, and for him to stop and let them get off.

Q. You were supposed to be in charge of the train, to give orders to the engineer in regard to stopping, in cases of that kind?

A. Yes, sir.

Q. Did that train stop at Waggaman?

A. Yes, sir; it did.

Q. Within what distance from the place where Bourman was hurt, did it stop?

A. About three car lengths from the place he was injured.

Q. Where was that three cars lengths from?

A. Right from where he got injured; the train proceeded about three car lengths from the place where he fell.

Q. When he fell, he fell off opposite the station house, as I understand?

A. Yes, sir.

Q. Was there any part of the train directly opposite to him at that time?

A. Yes, sir; there was.

Q. Which car?

A. The rear sleeper.

Q. How many cars did you have on that train?

A. Six cars.

Q. What car did he get off from?

A. He got off on the coach that was the third car from the engine, or the rear part of the third car.

Q. How long after he was hurt was it before you got to him?

A. O, I suppose about a minute.

Q. About a minute?

A. Yes, sir.

Q. Did you ask him how the accident happened?

A. I did; I asked him why he jumped off; I asked him if he was told to jump off and he said, he just thought the train would not stop.

Q. You positively asked him the question whether he was told to jump off that train or not?

A. I did.

64 Q. And then came out, in answer to your inquiries, as I understand it, as to how he got hurt?

A. Yes, sir.

By the COURT:

Q. I do not understand this exactly. Suppose this man had not been hurt, would the train have stopped?

A. Had he not been hurt? Yes, sir. There were six or seven in the gang and he was the only one that jumped off before the train came to a stop and got hurt; I had the foreman and six or seven other men put off there and intended to stop and did stop before we found out he was injured.

By Mr. COCKE:

Q. How long, prior to the time this injury, had you been running a passenger train on this division?

A. I have been running a passenger train on this division since 1898.

Q. You had then been running about three years?

A. Yes, sir.

Q. Will you please state whether or not you had ever knowingly slacked up a train for the purpose of allowing the employees to jump off there while they were being transported to and from their places of work?

A. No, sir.

Q. Do you know of any practice at Waggaman, or at any other place along the line of the road for that to be done?

A. No, sir.

Q. Would you or not consider it your duty to permit that to be done?

A. I would not.

Q. What is your duty as a passenger conductor in regard to stopping the train, when people are on there, whether passengers or employees, when they have to alight?

A. To see that they get off without injury.

Q. Does not that involve the stopping of the train?

A. Yes, sir; it does.

Q. Then you are prepared to state positively that you do not know of any such practice at Waggaman or at any other place along that division?

A. No, sir; no practice at all, in order to discharge passengers. Now, very often passengers come out at Waggaman to attempt to board this train while she slows up to get the mail; we are not responsible for that; if they get on it is at their own risk.

65 Q. Waggaman is not a regular stopping station?

A. No, sir.

Q. That is the risk of people who get on the train that they know is not going to stop?

A. Yes, sir.

Q. But as I understand you, you never take people on, or permit them to get off, by allowing them to jump off?

A. No, sir.

Q. At what speed was this train going at the time that Bourman got hurt?

A. I judge about, between eight and ten miles an hour.

Q. What brakes did you have on?
A. The regular air brakes.
Q. Within what distance can a train, going eight or ten miles an hour be stopped, when equipped with air brakes?
A. Within two coach lengths, easily.
Q. That checks every car on the train, does it not?
A. Yes, sir.
Q. What signals were given by the engineer on approaching Waggaman Station?
A. Why, none; he was told to stop there.
Q. Would it not be customary for him to whistle?
A. Yes, sir.
Q. Were any whistles which indicated that the train was going to stop at the station?
A. He blew for the station the regular whistle.
Q. Would he have given that signal, if he was not going to stop?
A. Yes, sir.
Q. The rule is, to whistle in passing a station, whether you are going to stop, or not?
A. Yes, sir, and then to get the mail.
Q. That is, in order for the mail to be put on?
A. Yes, sir.

Cross-examined.

By Mr. LIVAUDAIS:

Q. How long before reaching the station does the car usually stop, or slack its speed to exchange the mail; how far from the station?
A. Right opposite the station where they exchange the mail.
Q. How far before the reaching of the station do they slack their speed?
66 A. Well, they slack it I suppose about 200 or 300 yards; they slow up.
Q. Have you seen any one alighting from the train, or getting on the train whilst it was traveling at slow speed, in front of the station?

Mr. Cocke for the defendant objects to the inquiry, on the ground that even if the witness answered in the affirmative, it would not establish a custom, because the witness testified, of people coming up there and knowing it was only a flag station, were trying to get on the train: that the conductor would not be responsible for a matter of that kind, and also that it is irrelevant.

Q. Did you ever see any passenger boarding the train or alighting from the train whilst she had reduced her speed, passing in front of Waggaman Station to get the mail?
A. Yes, sir; I have seen them boarding the train at that place.
Q. When she slowed her speed?
A. Yes, sir.
Q. Did you see anything of that accident?
A. This accident. I did; yes sir.
Q. Where was Bourman at the moment immediately preceding the accident?

A. He was in the rear part of the second class coach, the coach that he was on, the third coach from the engine in the rear part of it.

Q. Do you know what was his relative position towards the other employees, who were traveling with him; where was he standing in relation to the others?

A. Why he was standing on the steps.

Q. What step was he standing on?

A. Standing on the steps of that coach.

Q. Was he on the lower or the upper steps?

A. I cannot say, he was out of the door on the outer platform of the steps; I do not know what steps, whether it was the second or the third.

By Mr. COCKE:

Q. Did you see him fall?

A. Yes, sir.

Q. Where were you?

A. I was standing right in front of that coach; I was standing on the outside ready to make the stop for them.

67 By Mr. LIVAUDAIS:

Q. How far above the station was it that he jumped from the car?

A. I think he jumped off just above the station coming in, there, or right opposite, just above the station, I think.

Q. At that time, as I understood you to say, the train had already slacked its speed; it was traveling between eight and ten miles an hour?

A. Yes, sir.

Q. You say ten miles an hour?

A. No, sir; I did not, between eight and ten miles an hour.

S. B. SMITH, sworn for the defendant, says:

By Mr. COCKE:

Q. What is your business?

A. A locomotive engineer.

Q. For what company?

A. The Texas & Pacific Railway Co.

Q. How long have you been employed by that company as locomotive engineer?

A. Since 1889.

Q. Will you please state whether or not you were in charge of the train, which transported Jonas Bourman, the plaintiff in this case, from Davis to Waggaman on the 2nd December, 1901?

A. Yes, sir; but to do so, I have had to refer to my report, it has been so long ago.

Q. Do you remember the accident?

A. Yes, sir; I remember the accident and my report.

Q. Will you please state whether or not, Mr. Wolf, as conductor of that train requested you to stop at Waggaman?

A. He did.

Q. You would not ordinarily have stopped, except at his request?
A. No, sir.
Q. The station being a mere flag station, where you slowed up for the mail?
A. Yes, sir.
Q. State whether or not you did stop?
A. I did stop.
Q. Within what distance from the place where Bourman was hurt?
68 A. I do not know; I did not see him when he was hurt; I *do* [did] not know anything of the accident until we had left the station; the fireman told me that he thought that there was either a sick man, or a man that was hurt, put in the baggage car.
Q. What speed were you going at the time you checked your engine?
A. Well, I was making schedule time, which is between 30 and 35 miles an hour; he made the usual application to stop at the station and I made the stop.
Q. You were going about ten miles an hour?
A. Well, I can only say I made the usual speed; when this occurred, I do not know; he may have jumped off before I shut off at all.
Q. You were running on this division constantly, were you not?
A. Yes, sir.
Q. It is claimed here that there was a practice for conductors and engineers merely to slacken up their train, approaching Waggaman, and the men jumped off or got on the train, while the train was in motion. Did you ever know of such a custom?
A. That is the first I ever heard of it.
Q. You never observed it on this division?
A. No, sir.

By Mr. LIVAUDAIS:

Q. Could not, however, that custom of jumping off trains while they had slacked up their speed at that station have existed without your knowledge?
A. Well, yes, sir; I suppose so.

V. F. BRUTBACHER, sworn for the defendant, says:

By Mr. COCKE:

Q. Where do you live?
A. At Raceland at the present time?
Q. What are you doing at Raceland?
A. Telegraph operator at present.
Q. For what company?
A. The Southern Pacific.
Q. How long have you been with the Southern Pacific?
A. Off and on for the last 20 years.
69 Q. Where were you employed on the 2nd of December, 1901, at the time that Jonas Bourman got hurt?
A. At Avondale on the Southern Pacific.

Q. What was your position at that time?
A. Telegraph operator.
Q. Will you please state whether or not you saw Bourman hurt?
A. Yes, sir; I saw Bourman alight off the train at Waggaman.
Q. Where were you standing at the time?
A. Standing at the Texas & Pacific depot.
Q. How far was Bourman from you at the time he fell?
A. Bourman? About from six to eight feet.
Q. Will you please state whether he made any statement to you as to how he came to be hurt?
A. No, sir; he made no statement to me whatever.
Q. Did you hear him make any statement to Mr. Hednott, the foreman?
A. Yes, sir; he made a statement to Mr. Hednott, the section foreman.

Mr. Livaudais for the plaintiff objects, because the statements made to another party are not in evidence in this case.

Q. What statement did he make to Mr. Hednott?
A. After the train had stopped, Mr. Hednott came up and he told the colored gentleman;—"why, did I not tell you not to jump off the train." And he said, "Captain, I did not hear you."
Q. Who was Mr. Hednott?
A. Mr. Hednott was the section foreman of the Texas & Pacific at Waggaman.
Q. How long have you been at Waggaman?
A. I was at Waggaman two years and a half.
Q. How long had you been there in December, 1901?
A. I had been residing right at Waggaman, right alongside of the Texas & Pacific depot.
Q. How long had you been there in December, 1901? How long before that?
A. I was at the depot from about 6:15 that morning.
Q. How many years or months had you been there?
A. At that time I had been residing at Waggaman eight months.
Q. Will you please state whether or not, you knew anything of the custom for trains to be slackened up there for people to
70 jump off or alight from the trains without their being stopped?
A. No, sir; I do not know of any such thing.
Q. You were living right at the station, were you not?
A. Yes, sir.

R. C. STRAIN, sworn for the defendant, says:

By Mr. COCKE:

Q. Where do you live?
A. In the City of New Orleans.
Q. What is you- business?
A. I am chief clerk in the superintendent's office.
Q. You are chief clerk in Mr. Paul's office?
A. Yes, sir.

Q. Will you please state whether or not I requested you to have Mr. Hednott and his brother report as witnesses in this case?
A. Yes, sir; you did.
Q. Will you please state why they are not here?
A. Well, when you made the request, of course, I took it up immediately with the roadmaster, who has charge of the section hands, and he said that Hednott was not in the service, and when last heard of he was in Lake Charles.
Q Did you make any effort to procure his attendance here, or to ascertain his whereabouts?
A. Yes, sir.
Q. And you could not find him?
A. No, sir; I could not find him or locate him.

Defendant rests its case.

JONAS S. BOURMAN, recalled for the plaintiff in rebuttal.

By Mr. LIVAUDAIS:

Q. The question is, whether there existed such a custom, established or allowed by this railroad company, that you- laborers were to alight from their trains, when they slowed or slackened their speed at Waggaman Station? Is it so?

Mr. Cocke for the defendant objects, on the ground that it asks for an opinion of the witness. He can state facts which would go to make up a custom, but he cannot state that the custom
71 exists, because that is to be inferred from the particular facts which go to constitute it.
Q. Did you do it yourself?
A. I did it myself.
Q. Alight from the train while it was in motion?
A. No, sir; I always did get off the train the same way.
Q. What way was that?
A. When she slackened up at the station.
Q. At what station?
A. At Waggaman Station.
Q. You had done it before?
A. Yes, sir.
Q. How often had you done it before?
A. I done it twice before the day the accident happened.
Q. Did anybody else do it with you, to your knowledge?
A. The laborers and foreman got off the same way as I did—slackened at Waggaman, Willie Holmes got off the same way with me, coming there too.
Q. Who was immediately on the scene, after the occurrance, after you were run over, did you see Mr. Brutbacher?
A. No, sir; I did not see him.
Q. That is the witness who testified last?
A. No, sir; I did not see him at all anywhere around.
Q. Do you know where he was?
A. No, sir; I did not see him at all; only the one man was there

that grabbed me from under, on the ground and held me there with his hand; that was the operator.

By Mr. COCKE:

Q. Was not that (the last witness) the operator?
A. No, sir; he was not the one.
Q. Do you swear that Mr. Brutbacher was not there?
A. He was not the one standing about there.
Q. Are you willing to swear that he was not there?
A. He was not anywhere around; I did not see him.
Q. He might have been there and you not see him?
A. Not at the time where I was, when I got hurt.
Q. Are you willing to swear that he was not there?
A. He could be somewhere else, but not right there at the station; when the accident happened he was not there.
Q. Are you willing to swear he was not at the station that day, at the time you were hurt?
A. No, sir; he was not right there at that time.
72 Q. Then *is* [if] he says he was, either he or you are mistaken?
A. Well, he was not there; I did not see him there, there was only one man standing there, with the baggage in his hand.
Q. You were hurt pretty badly, were you not?
A. Yes, sir; I was hurt pretty badly, but I had my eyes and could see.

WILLIE HOLMES, recalled for the plaintiff in rebuttal.

By Mr. LIVAUDAIS:

Q. Did you alight from a Texas & Pacific train, running?
A. Yes, sir.
Q. You have done that at Waggaman Station?
A. Yes, sir.
Q. Do you know whether others besides yourself have done it?
A. Others besides me have done it to be getting on and off the train.
Q. Who else besides yourself have been in the habit of doing it, that is your fellow laborers?
A. A lot of the boys, I do not know all their names.
Q. Was it the general custom?

Mr. Cocke for the defendant objects to the form of the question, as asking the opinion of the witness, and as being leading.

Q. Who else do you know jumped from the train, that is, who else of the laborers jumped from the train at that station, on this occasion and before?
A. They have jumped the train at that station?
Q. Yes, before or after this occurrence?
A. Well, I saw the people coming down and getting off the train and on; we used to come to the train to do it to come to town, and we would catch it as it came along; but we did not have to do so.

CLARA CLEVELAND, sworn for the plaintiff, in rebuttal.

By Mr. LIVAUDAIS:

Q. You stated that you saw when Bourman jumped off that train?
A. Yes, sir.
73 Q. Have you ever seen anybody else jump off that train, as it slackened its speed in passing the station?
A. No, sir.
Q. You never have seen that?
A. No, sir.

Mr. Cocke for the defendant now renews his motion that the Court direct the jury to return a verdict for the defendant, on the evidence submitted.

And after hearing argument, the Court granted the motion and directed the jury to return a verdict for the defendant.

Motion for New Trial.

Filed Mar. 16, 1906.

United States Circuit Court for the Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY CO.

And now comes the defendant, the Texas & Pacific Railway Company and moves the Court to set aside the verdict herein and the judgment rendered thereon on the 13th day of March, 1906, and grant the defendant a new trial for the following reasons, to-wit:

First. That the verdict and the judgment of the Court rendered thereon are contrary to the law and the evidence.

Second. That the verdict and the judgment rendered thereon are not sustained by sufficient evidence.

Third. That the Court erred in refusing to maintain and grant defendant's motion for a peremptory instruction requiring the jury to find a verdict for the defendant.

Fourth. The Court erred in refusing to instruct the jury as requested in defendant's special instruction numbered one.

Fifth. The Court erred in refusing to instruct the jury as requested in defendant's special instruction numbered two.

74 Sixth. The Court erred in refusing to instruct the jury as requested in defendant's instructions numbered three.

Seventh. The Court erred in refusing to instruct the jury as requested in defendant's special instruction numbered four.

Eighth. The Court erred in refusing to instruct the jury as requested in defendant's special instruction numbered five.

Ninth. The Court erred in refusing to instruct the jury as requested in defendant's special instruction numbered six.

Tenth. The Court erred in refusing to instruct the jury as requested in defendant's special instruction numbered seven.

Eleventh. The Court erred in its general charge to the jury in making use of the following language to which language exception was taken and reserved by defendant's counsel at the conclusion of said charge, and before the retirement of the jury, namely:

"It was the duty of the defendant railway company to use ordinary care in affording the plaintiff a reasonable safe opportunity of landing at Waggaman Station. The main question for you to decide is: Did the defendant Railway Co. afford the plaintiff such an opportunity? If the defendant did not do so, and if the plaintiff did not contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant Railway Co. would be liable to him for his injuries."

But I repeat to you that it was the duty of the defendant Railway Co. to afford the plaintiff a reasonably safe opportunity to alight at Waggaman."

Therefore, if you find that the defendant Railway Co. failed in this duty; that the failure was the direct and proximate cause of plaintiff's injury; that the plaintiff did not assume the risk and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he suffered."

Wherefore mover prays that the plaintiff be ordered to show cause on Saturday, the 24th day of March, 1906, at eleven o'clock A. M., why the said verdict and judgment should not be set aside and a new trial granted herein.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Defendant.

75 **Memo. of testimony on behalf of plaintiff, heretofore printed at page 23.**

* * * * * * *

Order Refusing New Trial.

Extract from the Minutes.

November Term 1905.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY CO.

NEW ORLEANS, FRIDAY, *April* 6, 1906.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.
This cause came on at a former day to be heard upon the motion

of the defendant for a new trial herein, and was by counsel for the respective parties submitted to the Court.

Whereupon, after due consideration by the Court it is now ordered that the motion of the defendant for a new trial herein be refused and that the verdict and judgment remain undisturbed.

Extract from the Judgment Book.

November Term, 1905.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

No. 13158.

JONAS S. BOURMAN
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

NEW ORLEANS, TUESDAY, *March 13th*, 1906.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

By reason of the verdict of the jury herein and in accordance therewith: it is ordered, adjudged and decreed that there be
76 judgment in favor of the plaintiff, Jonas S. Bourman, and against the defendant, the Texas and Pacific Railway Company, for the sum of three thousand ($3,000.00) dollars with legal interest from date, until paid and costs.

Judgment rendered March 13th, 1906.

Judgment signed April 7th, 1906.

(Signed) CHARLES PARLANGE, *Judge.*

Petition for Writ of Error.

Filed April 20, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

The petition of the Texas & Pacific Railway Company, defendant in the above entitled and numbered cause, with respect represents:

That on or about the 13th day of March, 1906, this Court, upon a verdict of the jury, entered a judgment against this defendant, and after motion for a new trial was overruled, signed the same on the 7th day of April, 1906, and same then became final.

That in said judgment, and in the proceedings had in this cause prior thereto, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error herein filed.

That petitioner is entitled and desires to have this cause removed by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, holding sessions at the City of New Orleans, Louisiana, to have said judgment reviewed and reversed.

Wherefore, petitioner prays that, in accordance with law and the rules of Court, a writ of error may issue to remove said cause to the United States Circuit Court of Appeals for the Fifth Circuit, for the correction of said errors and the reversal of said judgment, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that said writ of error may operate as a supersedeas, upon petitioner furnishing bond in accordance with law, with good and solvent surety, in the sum of five thousand dollars ($5,000); and petitioner prays for general relief.

77

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Petitioner.

Order.

Upon consideration of the foregoing petition, and the assignment of errors filed therewith;

It is ordered, that the defendant be, and it is hereby allowed the writ of error prayed for, upon its giving bond conditioned according to law, with good and solvent surety in the sum of five thousand dollars ($5,000), which shall operate as a supersedeas and stay of execution; and it is further ordered that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, returnable according to law.

New Orleans, April 20th, 1906.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Assignment of Errors.

Filed April 20th, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

And now comes the defendant, The Texas & Pacific Railway Company, by its counsel, and files herewith, in connection with its peti-

tion for a writ of error, the following assignment of errors, which it avers occurred during the progress and upon the trial of this cause, to-wit:

(1) The Court erred in overruling the exception of no cause of action filed *in limine* by this defendant on the 8th day of April, 1903.

(2) The Court erred in refusing to direct the jury to find a verdict in favor of the defendant.

78 (3) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"The burden is upon the plaintiff to prove, by a preponderance of credible evidence, that the plaintiff was negligent, and that its negligence was the direct cause of the injury. In order to show that the defendant's foreman, Hodnett, was negligent, the plaintiff is bound to show to your satisfaction that said Hodnett ordered him to jump from the moving train, and that he obeyed such order in reliance on said Hodnett's superior knowledge and judgment. If you do not believe from the evidence that any command to jump was given by Hodnett; or if you believe that the plaintiff in jumping from said train acted entirely on his own volition, and not because of any order given him by said Hodnett, then the plaintiff cannot recover, and your verdict must be for the defendant."

(4) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"If you find from the evidence that the foreman, Hodnett was negligent, as charged in the petition; and if you further find from the evidence that the plaintiff was also negligent and careless of his own safety in jumping from the moving train upon which he was being carried, and that but for such negligence and carelessness he would not have been injured, then your verdict must be for the defendant."

(5) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"If you find from the evidence that the plaintiff's injury was caused by the negligence of the foreman, Hodnett, and not by the plaintiff's own act or negligence, then I charge you that the negligence of said foreman was the negligence of the plaintiff's co-servant, the risk of which the plaintiff assumed, and your verdict must be for the defendant."

(6) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"I charge you that a locomotive engineer has, in the absence of notice to the contrary, the right to assume, whilst handling his train,

79 that persons being conveyed thereon will not attempt to alight while such train is in motion. If, therefore, you find from the evidence that the train which caused the injury was jerked or started forward by the engineer prior to being brought to a full stop at Waggaman Station, and just at, or prior to, the moment that the plaintiff undertook to jump therefrom, then the act of the engineer in so jerking or starting said train, was not such negligence as entitles the plaintiff to recover in this case."

(7) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"If you find from the evidence that the plaintiff's injury was caused by the negligence of the engineer of the train on which plaintiff was being transported, and not by the plaintiff's own act or negligence, then I charge you that the negligence of said engineer was the negligence of the plaintiff's co-servants, the risk of which the plaintiff assumed, and your verdict must be for the defendant."

(8) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"The risk of jumping from a train moving at a speed of from eight to ten miles an hour is a clear and obvious one, and if you find from the evidence that the plaintiff undertook to jump from a train moving at that rate of speed and was injured thereby, then he was negligent in so doing, even if ordered by Hodnet to do so, and cannot recover in this case for such injury."

(9) The Court erred in refusing to instruct the jury, as requested by the defendant, as follows, to-wit:

"If you find from the evidence that the employees in charge of trains of the defendant upon which plaintiff or other laborers employed by the defendant were from time to time transported from or to their places of work, were in the habit of merely slacking the speed of said trains instead of stopping them at Waggaman or other points at which said plaintiff or other employees were expected to alight; and if you further find from the evidence that the plaintiff was aware of such practice at the time of the accident, and undertook to alight from the train on which he was being transported while same was in motion, and was hurt, then I charge you that the plaintiff assumed the risk of injury incident to such attempt, and cannot recover in this case."

80 (10) The Court erred in instructing the jury in its general charge as follows, to-wit:

"It was the duty of the defendant Railway Company to use ordinary care in affording the plaintiff a reasonably safe opportunity of landing at Waggaman station. The main question for you to decide is: Did the defendant Railway Company afford the plaintiff such an opportunity? If the defendant did not do so, and, if the plaintiff did not contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant Railway Company would be liable to him for his injuries.

* * * * * * *

"But I repeat to you that it was the duty of the defendant Railway Company to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

"Therefore, if you find that the defendant Railway Company failed in this duty; that the failure was the direct and proximate cause of plaintiff's injury; that the plaintiff did not assume the risk; and that he did not contribute in any way to his injury by his own negligence, then, you should find in favor of the plaintiff for such damages as he suffered."

(11) The Court erred in overruling the motion of the defendant for a new trial.

(Signed) HOWE, SPENCER & COCKE,
Att'ys for Defendant.

Bond for Writ of Error.

Filed April 20, 1906.

United States Circuit Court, Eastern District of Louisiana.

No. 13158.

JONAS S. BOURMAN
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

Know all men by these presents, That we, The Texas & Pacific Railway Company, as principal, and Pearl Wight, of the City of New Orleans, as surety, are held and firmly bound unto Jonas S. Bourman, plaintiff in the above cause, in the full and just
81 sum of five thousand dollars ($5,000), to be paid to the said Jonas S. Bourman, his certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 20th day of April, in the year of our Lord, one thousand nine hundred and six.

Whereas, lately at a *season* of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, in a suit pending in said Court, between Jonas S. Bourman, plaintiff, and the Texas & Pacific Railway Company, defendant, a judgment was rendered against the said The Texas & Pacific Railway Company, and the said The Texas & Pacific Railway Company, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said Court to reverse said judgment, and a citation directed to the said Jonas S. Bourman citing and admonishing him to be and appear before the United States Circuit — of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date hereof.

Now, therefore, the condition of the above obligation is such that if said The Texas & Pacific Railway Company shall prosecute its said writ to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and effect.

Signed, sealed and delivered in the presence of

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY,
By HOWE, SPENCER & COCKE,
Its Attorneys.

(Signed) PEARL WIGHT, *Surety.*

Bond and surety approved, April 20, 1906.
(Signed) CHARLES PARLANGE,
U. S. Judge.

82 [*Clerk's Certificate.*]

UNITED STATES OF AMERICA:

Circuit Court of the United States Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Henry J. Carter, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do hereby certify, that the foregoing 124 pages contain and form a full, complete, true and perfect transcript of the Record and proceedings had, and assignment of errors together with all the evidence adduced on the trial in the case of Jonas S. Bourman, *vs.* Texas & Pacific Railway Company, No. 13158, of the Docket of the said Court.

Witness my hand and the seal of said Court, at the City of New Orleans, this 15th day of May, A. D. 1906.

[SEAL.] H. J. CARTER, *Clerk.*

* * * * * * *

83 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Jonas S. Bourman plaintiff, and The Texas & Pacific Railway Company, defendant, (being a judgment for $3000.00 with legal interest from its date and costs) which judgment was rendered March 13, 1906 and signed April 7th, 1906 in the cause 13,158, New Orleans Division, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company against whom said judgment was rendered, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April in the year of our Lord one thousand nine hundred and six.

84 [SEAL]

H. J. CARTER,
Clerk of the U. S. Circuit Court,
Eastern District of Louisiana.
By E. M. FULLER,
Deputy Clerk.

Allowed as a supersedeas by

CHARLES PARLANGE,
U. S. Judge.

The foregoing has the following indorsements to-wit:
No. 13158. Jonas S. Bourman *vs.* Texas and Pacific Railway Co. Writ of Error. No..... U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division, Filed April 20, 1906. E. M. Fuller, Deputy Clerk.

85 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Jonas S. Bourman, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Circuit, to be holden at the City of New Orleans, within 30 days from date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said Plaintiff in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 25 day of April in the year of our Lord one thousand nine hundred and six.

CHARLES PARLANGE, *Judge.*

Service accepted

ALBERT VOORHIES, *Att'y.*
W. E. LIVAUDAIS.

The foregoing has the following indorsements to-wit:
United States Circuit Court. Eastern District of Louisiana, No. 13158. Jonas S. Bourman *vs.* Texas & Pacific Railway Co. Citation of Appeal. Marshal's Return. No..... U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed April 20, 1906. E. M. Fuller, Deputy Clerk.

86 And thereafter on February 7th, 1907, an order of said Circuit Court of Appeals designating Judge William T. Newman to sit in this cause was made in words and figures following, to-wit:

Order Designating Judge.

Ordered that Honorable William T. Newman, United States District Judge for the Northern District of Georgia, be, and he is hereby designated to sit in this court in place of Honorable Don A. Pardee, Circuit Judge, in the hearing of cause No. 1562, The Texas and Pacific Railway Company, *vs.* Jonas S. Bourman, whereupon he took his place upon the bench, and the following proceedings were had and done, to wit:

Argument and Submission.

FEB. 7, 1907.

No. 1562.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
JONAS S. BOURMAN.

On this day this cause was regularly called, and after argument by C. P. Cocke, Esq., for plaintiff in error, was continued until tomorrow.

FEB. 8, 1907.

No. 1562.

THE TEXAS & PACIFIC RAILWAY COMPANY
vs.
JONAS S. BOURMAN.

On this day this cause was called for further hearing, and after argument by Albert Voorhies, Esq., and A. E. Livaudais, Esq., for defendant in error, and Charles P. Cocke, Esq., for plaintiff
87 in error, was submitted to the court.

And thereafter, on March 5th, 1907, an opinion of said Circuit Court of Appeals was filed in said cause in words and figures following, to-wit:

Opinion.

88 U. S. Circuit Court of Appeals. Filed Mar. 5, 1907. Charles H. Lednum, Clerk.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 1562.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JONAS S. BOURMAN, Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Before McCormick, Shelby and Newman, Judges.

By the COURT:

This case was twice tried in the court below. On the first hearing, April 22nd, 1904, at the close of the testimony a motion was made by the counsel for the defendant to have the Court direct the jury to find a verdict for the defendant. The Court thereupon heard the argument from the counsel for both parties, and upon consideration thereof granted the motion of the defendant and a verdict and judgment duly followed.

The plaintiff duly moved for a new trial (April 23, 1904), on which an order was entered that the defendant do show cause on the 30th of April, 1904, why a new trial should not be granted, and that the matter be continued for hearing at the following term, at the same time filing with the record an opinion, which is, in its material parts, as follows:

"This matter being before me on motion for a new trial, I have carefully read the evidence and again considered the law applicable to the case. It appears from the evidence, that the plaintiff and other employés of the defendant, being under the control of
89 a foreman, boarded the "cannon ball" train at Davis, in order to return to Waggaman. That the conductor intended to stop the train at Waggaman to put off the men, but that this intention was not conveyed to plaintiff or his fellow laborers. That the plaintiff believed the train would only "slow up" at Waggaman and that he was then to jump off. That on former occasions plaintiff and others had jumped off at that place under the same circumstances, and knew that that particular train never stopped there, but only "slowed up" to take the mail. That while the foreman did not specifically order the plaintiff to jump off, he did tell him and the other man, "throw off your tools and let us get off," and that under the circumstances, plaintiff not having been told that the train was going to stop, may well have understood, as he says he did, that

the train would only "slow up," and that he was to jump off. After the train had slackened he jumped off and was injured.

"The motion to direct a verdict for defendant was virtually based on two propositions: 1st. That the injury was caused by the plaintiff's own negligent act, or by a risk incident to the employment and assumed by him. 2nd. That, in any event, the injury was due to, or caused by, the negligence of the plaintiff's fellow servants, meaning the foreman, the conductor, or engineer, or all of them." (Here the trial Judge cites authorities and thereafter proceeds:) "The question, therefore, is whether in the instant case the plaintiff is debarred by the doctrine of "fellow servants," and whether the matters of contributory negligence and assumption of risk should not have been left to the jury.

"The Court desires re-argument on those points, and the case will be restored to the trial docket for such purpose."

On June 22, 1904, this minute appears:

"This cause having been heretofore argued and submitted
90 to the Court upon the motion of plaintiff for a new trial, it is now ordered, for the reasons assigned in the written opinion filed this day, that the case be restored to the trial docket for re-argument."

The record further shows that on February 6, 1905, the following minute entry was made:

"This cause came on to be heard at a former day upon the rule of plaintiff for a new trial herein, and after hearing further arguments from counsel for the respective parties, the court took the same under advisement.

"On consideration thereof, it is ordered that a new trial be granted herein, and that the verdict heretofore rendered in this cause be set aside."

The record shows that on February 23, 1905, it was stipulated by counsel for the respective parties that the new trial granted should be had upon the testimony taken stenographically on the former trial.

On March 13, 1906, the cause being the second time on trial, the Court refused the charges requested by the defendant, giving as the reasons that the general charge is sufficient for all the purposes of the case. It is unnecessary to recite the general charge. We have examined it with care, and we have examined all the testimony with diligence, and we concur in the opinion of the trial judge that the general charge fully and correctly submitted the proper issues to the jury.

It follows that the judgment should be affirmed, and it is so ordered.

91 And thereafter, on March 5th, 1907, in the record of the proceedings of the said Circuit of Appeals is a judgment in said cause in the words and figures following, to-wit:

Judgment.

No. 1562.

THE TEXAS & PACIFIC RAILWAY CO.
vs.
JONAS S. BOURMAN.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the surety on the writ of error bond herein, Pearl Wright, be condemned, *in solido*, to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court.

March 5, 1907.

92 No. 1562.

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*
vs.
JONAS S. BOURMAN, *Defendant in Error.*

Assignments of Error.

Now comes the Texas & Pacific Railway Company, plaintiff in error, and says that there is error in the record and proceedings in the above entitled cause in this, to-wit:

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against The Texas & Pacific Railway Company, plaintiff in error, and in favor of the defendant in error, upon the trial of said cause.

II.

That the said court erred in holding that the Circuit Court committed no error in denying the motion of the Texas & Pacific Railway Company upon the trial of said action to direct a verdict in its favor at the close of all the evidence and testimony in behalf of both parties in the case.

III.

That the said court erred in holding that the Circuit Court committed no error in refusing the following special charge requested by the plaintiff in error, defendant in the court below, to-wit:

"I charge you that a locomotive engineer has, in the absence of notice to the contrary, the right to assume, whilst handling his train, that persons being conveyed thereon will not attempt to alight
93 while such train is in motion. If, therefore, you find from the evidence that the train which caused the injury was jerked, or started forward, by the engineer prior to being brought to a full stop at Waggaman Station, and just at, or prior to, the *amount* that the plaintiff undertook to jump therefrom, then the act of the engineer in so jerking or starting said train was not such negligence as entitled the plaintiff to recover in this case;" and erred in holding that the matter contained in said special charge was contained in, or covered by, the general charge of the trial court.

IV.

That the said court erred in holding that the Circuit Court committed no error in refusing to give to the jury, at the request of the plaintiff in error, defendant in the court below, the following special charge, to-wit:

"If you find from the evidence that the plaintiff's injury was caused by the negligence of the engineer of the train on which plaintiff was being transported, and not by the plaintiff's own act or negligence, then I charge you that the negligence of said engineer was the negligence of the plaintiff's co-servant, the risk of which the plaintiff assumed, and your verdict must be for the defendant;" and erred in holding that the matter of said special charge was covered by, or contained in, the general charge of the trial court to the jury in said cause.

V.

That the said court erred in holding that the Circuit Court committed no error in refusing to give to the jury, at the request of the plaintiff in error, defendant in the court below, the following special charge, to-wit:

"The risk of jumping from a train moving at a rate of from eight to ten miles an hour is a clear and obvious one, and, if you find from the evidence that the plaintiff undertook to jump from a train
94 moving at that rate of speed, and was injured thereby, then he was negligent in so doing, even if ordered by Hodnett so to do, and cannot recover in this case for such injury;" and erred in holding that the matter of said special charge was contained in, or found in the charge of the trial court to the jury on the trial of said cause.

VI.

That the Court erred in holding that the Circuit Court committed no error in using, in the course of its general charge to the jury, the following language, to-wit:

"It was the duty of the defendant railway company to use ordinary care in affording the plaintiff a reasonably safe opportunity of alighting at Waggaman Station. The main question for you to decide is: Did the defendant railway company afford the plaintiff such an opportunity? If the defendant did not do so, and the plaintiff did not contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant railway company would be liable to him for his injuries. * * *

"But I repeat to you that it was the duty of the defendant railway company to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

"Therefore, if you find that the defendant railway company failed in this duty, that the failure was the direct and proximate cause of plaintiff's injury, that the plaintiff did not assume the risk, and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he has suffered."

Wherefore, The Texas & Pacific Railway Company prays that the judgment entered herein against it may be set aside and reversed, and that a judgment in its favor may be entered, as prayed in its answer.

HOWE, SPENCER & COCKE,
Attorneys for Plaintiff in Error.

95 The foregoing has the following indorsements to-wit:

No. 1562. United States Circuit Court Of Appeals For The Fifth Circuit. Texas & Pacific Railway Company, Plaintiff in Error, *vs.* Jonas S. Bourman, Defendant in Error. Assignments Of Error. Howe, Spencer & Cocke, For Plaintiff in Error. Filed 23rd day of March, 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

96 Know all Men by these Presents, That we, The Texas and Pacific Railway Company, as principal, and George J. Gould, of Lakewood, New Jersey, as surety, are held and firmly bound unto Jonas S. Bourman in the full and just sum of five thousand (5000) dollars, to be paid to the said Jonas S. Bourman, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this Fifteenth day of March, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit in a suit depending in said Court, between the Texas and Pacific Railway Company, Plaintiff in Error and Jonas S. Bourman, a judgment was rendered affirming a judgment rendered in the Circuit Court of the United States for the Eastern District of Louisiana at the November term, 1905, against the said Railway Company for the sum of three thousand (3000) dollars with interest and costs: and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in

the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jonas S. Bourman citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said The Texas and Pacific Railway Company shall prosecute its said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY CO. [SEAL.]
By GEO. J. GOULD, *Pres't.* [SEAL.]
GEO. J. GOULD. [SEAL.]

[SEAL.] Attest:

C. E. SATTERLEE, *Sec'ty.*
D. D. DUNCAN.

Approved, to operate as a supersedeas, by

EDWARD D. WHITE,
Associate Justice of the
Supreme Court of the United States.

[Endorsed:] Copy. Bond. No. 1562. The Texas & Pacific Ry. Co. *v.* Jonas S. Bourman. Bond for writ of error. Filed 23 day of Mch. 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The Texas and Pacific Railway Company, Plaintiff in Error and Jonas S. Bourman, Defendant in Error a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of March, in the year of our Lord one thousand nine hundred and seven.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Original. No. 1562. The Texas & Pacific Ry. Co. *v.* Jonas S. Bourman. Writ of error. Filed 23 day of Mch. 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's office for the use of the defendant in error, 23rd day of March, 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

98 Original.

UNITED STATES OF AMERICA, *ss:*

To Jonas S. Bourman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this 19th day of March, in the year of our Lord one thousand nine hundred and seven.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

99 [Endorsed:] Original. No. 1562. The Texas & Pacific Ry. Co. *v.* Jonas S. Bourman. Citation. Filed 26 day of March, 1907. Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

Service accepted for J. S. Bourman, defendant in error.
A. E. & O. S. LIVAUDAIS,
ALBERT VOORHIES,
Of Counsel.

100 United States Circuit Court of Appeals.

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 98 pages, numbered from A to 97 inclusive, contain a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had, including the opinion of the court, in the case of The Texas and Pacific Railway Company, plaintiff in error, *versus* Jonas S. Bourman, defendant in error, No. 1562, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 26th day of March, A. D. 1907.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 20,652. U. S. circuit court appeals, 5th circuit. Term No. 56. The Texas & Pacific Railway Company, plaintiff in error, *vs.* Jonas S. Bourman. Filed April 3d, 1907. File No. 20,652.

FILED
DEC 7 1908
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 56.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

versus

JONAS S. BOURMAN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

A. E. LIVAUDAIS,
ALBERT VOORHIES,
Attorneys for Jonas S. Bourman,
Defendant in Error.

OLIVER S. LIVAUDAIS,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

Supreme Court of the United States

No. 56

October Term, 1908

IN THE MATTER

OF

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VERSUS

JONAS S. BOURMAN,
DEFENDANT IN ERROR.

BRIEF FOR JONAS S. BOURMAN, DEFENDANT IN ERROR.

This writ of error is directed to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit on the application of the Texas and Pacific Railway Company, plaintiff in error, in the suit of the *Texas & Pacific Railway Company, Plaintiff in Error, vs. Jonas S. Bourman, Defendant in Error,* No. 1562 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit.

Statement of Case.

This action to recover damages for personal injuries was originally instituted in the District Court for the Parish of Jefferson, State of Louisiana, and was removed by the defendant to the Circuit Court of the United States for the Eastern District of Louisiana, in which Court this case was twice tried by a jury.

At the close of the evidence at the first trial the Court sustained a motion by the defendant for the direction of a verdict in favor of the defendant. Thereafter the Court granted the plaintiff a new trial. At the new trial so granted the Court denied a similar motion for a peremptory instruction again urged by the defendant and also denied certain special charges requested by the defendant. Separate bills of exception were reserved to the action of the Court in refusing the peremptory instruction to return a verdict as asked, and in refusing the said special charges, and bills of exception were taken, together with a further bill reserved to the general charge. The bills of exception reserved in this case are mainly directed against the Judge's general charge and his refusal to charge the jury in the manner requested by the defendant on the ground of nonliability of the company in case the injury was sustained through the fault or negligence of a fellow-servant of the plaintiff.

The Evidence.

The evidence shows that Jonas S. Bourman was one of a gang of land laborers under the orders and control of

a foreman. The work being done at Davis Station, the foreman took the gang on plaintiff's train to transport them to the next station (Waggaman) for more land-labor. He instructed the conductor and engineer of the fact. When near Waggaman the train slackened to about eight or ten miles an hour; blew two whistles, a long and a short one; kept slacking until opposite Waggaman, when the motion was slow enough to allow the laborers to alight. The defendant Bourman, obeying the orders of his foreman, preparatory to alighting, threw off his shovels, held on to the rod along the steps, and was in the act of attempting to land, when a sudden jolt or jerk of the train, occasioned by intention to increase speed, threw him off his balance. He held on to the rod as long as his strength allowed, and then, a few yards beyond, he fell, and one of his legs passed under the wheels, and he was injured.

(N. B.—The entire evidence taken in this case on the trial before the Circuit Court is contained in the transcript, pages 36 to 63.)

The Pleadings.

This suit was first instituted in the Twenty-eighth Judicial District Court for the Parish of Jefferson, State of Louisiana, November 12, 1902, and on November 20, 1902, was transferred, on application of the defendant, to the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

On April 8, 1903, the defendant filed in the said Circuit Court a peremptory exception of no cause of action, which was overruled, and on the 21st day of April, 1903, came into court and filed an answer, denying all and singular the allegations of the petition; admitting that said plaintiff was on the 2d day of December, 1901, employed by defendant as a laborer; denying that said plaintiff was injured by any act, neglect or default on its part, or on the part of any person or persons for whose acts, neglect or default it was responsible; averring that, if the said plaintiff was injured (which they denied), then and in that case he was injured by his own act, neglect or default, or by the act, neglect or default of his fellow-servants, the risk of injury from which he had assumed.

On the 19th day of April, 1904, the defendant filed a supplemental and amended answer, in which it averred that, if said plaintiff was injured at all, he was injured either by his voluntary act or default in unnecessarily jumping from the train on which he was being transported when the train was in motion, or by the act, neglect or default of his fellow-servants—to wit, by act or default of the foreman, under whose charge the said plaintiff was at the time of said alleged injury, in ordering and requiring said plaintiff (if he did so order and require, which is denied) to jump from said moving train; or by the *neglect and default of the conductor and engineer of said train in failing to reasonably stop the train in order that the plaintiff might have an opportun-*

ity to alight, if they failed to seasonably stop the said train for that purpose (which is denied). (Italics ours.)

Defendant further filed a second supplemental and amended answer, in which it specially denies the existence of any such custom as is alleged in said plaintiff's petition, and avers that, if such custom existed (which is denied), then and in that event he well knew the same, and the risk connected thereby and incident thereto, and assumed such risk in attempting to jump from said train while in motion.

The defendant admits in its answer that Bourman was at the time in their employ. The evidence shows that he was employed for the company by the railroad foreman, Willie Hadnott. Further in the testimony, Mr. J. B. Paul, division superintendent of the company's lines in Louisiana, admits that W. J. Hadnott was foreman of the gang in which Bourman was employed; that his (the said foreman's) duty was to take supervision of this gang, and he was supposed to perform his duties correctly; that he knows the section gang of laborers at the quarters at Waggaman, and that Hadnott was in charge of those quarters. The relations between Bourman and his foreman being thus established by these admissions, it is difficult to imagine under what construction of the fellow-servant doctrine the defendant i[illegible]ror, Bourman, a laborer, could be considered a fellow-servant of the person who had employed him and had authority to discharge him.

The generally-acknowledged doctrine under the law is that a servant entering employment impliedly agrees with his master to assume all ordinary risks incidental to the service, including that of negligence on the part of a fellow-servant, unless the master's personal negligence caused, or operated to cause, the injury complained of. (See Barrows on Negligence, p. 125.)

> "Although the servant assumes the risk of the negligence of his fellow-servants, he does not assume that of his master; and, if the master's negligence concurs with that of a fellow-servant to produce the injury complained of, the servant may recover therefor, provided the servant's own negligence does not proximately contribute to the injurious result."
>
> Barrows on Negligence, p. 146.

> "A servant has a right to rely upon the exercise of reasonable care by the master and his delegates in performing the obligation cast upon him, and everyone has a right to assume, unless he has notice to the contrary, that persons with whom he is brought in contact will exercise reasonable care, under the circumstances, not to do him injury, and he may govern his acts in accordance with this assumption. The same principle applies when, owing to the relations between them, certain obligations are cast upon one for the benefit of another; and a servant is not bound to anticipate that the master failed to use due diligence in performing the duties owed by him."
>
> Dresser's Employer's Liability, Assumption of Risks, par. 111, p. 528.

This well-established doctrine has been recognized in numerous adjudications of the higher Courts of this

country; in the State of Louisiana and other States; in the case of *Tutrix vs. Sellers,* 39 An. 1011, and a number of cases, notably *Powers vs. Calcasieu Sugar Company,* 48 An. 483; *McCarthy vs. Whitney Iron Works,* 48 An. 978; *Bland & Wife vs. Shreveport Belt Railway Company,* 48 An. 1057; *Wilson vs. La. & N. W. R. Co.,* 51 An. 1134; 108 La. 590.

In the case of *I. C. R. R. vs. Josey,* the Kentucky Court of Appeals (54 L. R. A. 78) held:

> "A foreman in charge of a crew, with power to determine where the car should be stopped, is not, in the act of applying the brakes, a fellow-servant of one of the crew, so as to relieve the railroad company from liability for injuries to the latter by his negligent application of the brakes."

The Supreme Court of Illinois (152 Ill. Rep. 590) held:

> "When a master confers authority upon one of his employees to take charge and control of a certain class of workingmen in carrying on some particular class of business, such employee, in governing and directing the movements of the men under his charge, is the direct representative of the master, and not a mere fellow-servant; and, if he is guilty of neglect by unskillful exercise of his power, the master must be held to answer" (quoting 110 Ill. 288).

In the case of *A. A. Patten vs. R. R.,* 96 N. C. Sup. Rep. 455, it was held:

> "Where a common master invests one of his employees with power to hire and discharge and command the other employees, the master is liable for

> his acts, and he is not a fellow-servant, although he works as any other servant. * * * So, while there is nothing in the nature of the employment of a section master on the railway to charge the master with responsibility for his acts towards his co-laborers, yet, if a common master give him the authority to command and discharge and employ the laborers, the common master is liable for his malfeasance towards his fellow-laborers in the exercise of the authority thus conferred."

We now respectfully submit to your Honors that, even admitting that the accident complained of was due to the fault or neglect of the foreman, conductor or engineer, or to either of them, belonging to the company, having the train in charge, this case comes under the exception where the company cannot avoid responsibility, for the reason that they themselves participated in the negligence and contributed to the accident.

In the case of *Quebec Steamship Company vs. Merchant,* 133 U. S. Sup. Ct. Rep. 375, wherein it was held that a stewardess and porter and carpenter employed on board the ship were fellow-servants, and for that reason the stewardess could not recover for injuries caused her by their negligence, the Court, in the body of their decision (p. 378) held:

> "The case, therefore, falls within the well-settled rule, as to which it is unnecessary to cite cases, which exempts the employer from liability for injuries to a servant caused by another servant, and does not fall within any exception to that rule which destroys the exemption of the employer when his own negli-

> gence contributes to the injury, or when the other servant occupies such a relation to the injured party, or to his employment, in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer."

The defendant Bourman cannot be said to have been guilty of negligence in leaving the train in the manner shown by the evidence, nor can he be held accountable for having done so, for the reason that, in so doing, he was following the instructions of his superior, the vice-principal of the company, his employer; and, that to be made guilty of negligence in obeying said order, it must be shown that he voluntarily and unnecessarily exposed himself to the danger.

See 110 An. 1.

In the case of *David Ballard vs. C., R. I. & P. R. Co.*, 51 Mo., 453, the Court of Appeals of the State of Missouri held:

> "If a servant jump from the master's moving train in obedience to the order of the boss, and in so doing is hurt, this will not bar his right of recovery unless the danger in obeying was so glaring that a reasonably prudent man would not have undertaken it; and whether it is prudent or rash must be determined by all the attendant circumstances."

In the case of *Northern Pac. R. Co. vs. Egeland*, which is a case in all matters very similar to the instant one, and which is reported in 56 F. R. 200, the Eighth Circuit Court of Appeals for the District of Minnesota, in their

decision, used the following language in their concluding remarks:

> "We have examined all the citations with which we have been favored, and have reached the conclusion that it is not a rule of universal application that a person must be deemed guilty of negligence whenever he attempts to leave a train while it is in motion. The authorities above referred to show, we think, that under some circumstances a person may make such an attempt without being chargeable with negligence. And where, as in the case at bar, there is testimony tending to show that a person has attempted to leave a train, pursuant to the order of its conductor, at a station where it was necessary to get off, and while the train was moving slowly, and in so doing has sustained injury, it should be left to the jury to say, in the light of all of the circumstances, whether such attempt was justifiable, and whether the plaintiff exercised ordinary care."

In that case, brought on appeal to the Supreme Court of the United States upon a writ of error to the Circuit Court of Appeals for the Eighth Circuit, the Supreme Court of the United States sustained the verdict, and in their concluding remarks they say:

163 U. S. 93.

> "If plaintiff reasonably thought he could with safety obey the order by taking care and jumping carefully, and if because of the order he did jump, the jury ought to be at liberty to say whether under such circumstances he was or was not guilt of negligence. If the train had been going at the rate of thirty, or even fifteen, miles per hour, the chance of injury resulting from a jump would have been so

great that plaintiff would probably have obeyed such an order at his own risk. We think a speed of four miles an hour, considering all the facts hereinabove detailed, and including the direction to jump, left the question of contributory negligence one for the jury. In this respect we think the trial Judge was correct."

In the case of *Brown vs. Ohio & Mississippi Railway Co.*, 138 Ind. Rep. 648, the Supreme Court of Indiana held:

"Where a brakeman upon a freight train is required in the discharge of his duty to alight from the moving train, while passing a station, to receive orders, and does so without any negligence, but, by reason of an obstructing plank nailed upon the station platform by the employer, is caused to stumble and fall under the train, to his injury, the employer is liable in damages."

In the case of *McGinn vs. McCormick*, 109 An. 396, the Supreme Court of Louisiana held:

"The doctrine of the nonliability of the master for injuries inflicted upon one of his fellow-servants by the negligence of a fellow-servant is predicated in part upon the presumed assumption by each servant of the risk to be incurred from the negligence of his fellow-servants, and in part, it is said, upon considerations of public policy; but such a foundation affords no support for the proposition that an injured servant is to be considered as having assumed the risk to be incurred from the negligence of the master combined with that of a fellow-servant. Contributory negligence, to defeat the right of action in such a case, must be that of the party injured."

In *Hunn vs. Railroad Co.*, 44 N. W. 502, 7 L. R. A. 506, the Supreme Court of Michigan said:

> "The correct rule, and the reason for it, is stated in *Paulmier vs. Railroad Company*, 34 N. J. Law, 151, as follows: The servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that, where such negligence contributes to the injury, the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servants."

The rule thus referred to has been recognized by the Supreme Court of the United States in *Railroad Co. vs. Charless*, 162 U. S. 359; 16 Sup. Ct. 848; 40 L. Ed. 999; and has been applied by the Supreme Court of Louisiana in *Towns vs. Railroad Co.*, 37 La. 630, and in many other cases.

In the case of *Grand Trunk Railway Company vs. Cummings*, 106 U. S. 700, the Supreme Court held:

> "The Court did not err in charging the jury that the company, if its negligence had a share in causing the injuries to plaintiff, was liable, notwithstanding the contributory negligence of his fellow-servant."

The same in the case of *Milwaukee vs. St. Paul R. R.*, 112 U. S. 377; the same in *Ellis vs. N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546; 109 La. An. 396, 402.

The several instructions asked by plaintiff in error, and presented to the Judge of the Circuit Court to be embodied in his charge, were by him denied for the reason,

as he says in his ruling (Tr., p. 26), that the general charge made by him to the jury was sufficient for all the purposes of the case.

The charges requested by counsel for the defendant in error were also denied for the reason that the general charge was sufficient for all the purposes of the case.

The several bills of exception presented by plaintiff in error referred to matters immaterial to the issue. The question of whether or not the employees charged with negligence in this case were fellow-servants of defendant in error was immaterial to the issue when it was dependent upon the negligence of the master, which, if proved, was of itself sufficient to justify a verdict irrespective of the relations between the negligent employees and defendant in error.

It was the duty of the master to have established rules which, if observed, would afford reasonable protection to the employees in the performance of their respective duties. Failure to do so is negligence, and for injuries to an employee resulting from such failure of duty the master is liable. (See A. & E. Enc., p. 101.)

> "Since the master is under a special duty to inspect and investigate risks to which the servant is exposed, and since the servant may rely upon the performance of this duty, the fact that the servant proceeds under the orders of the master in performing the act, whereby he is exposed to unusual danger, renders the master liable for a resulting injury to the servant, unless the risk of the act was fully realized by the servant, and was so apparent that

> no man of ordinary prudence, situated as he was, would have undertaken it. This rule holds where the act was within or without the scope of the servant's employment."
>
> Am. & Eng. Enc., p. 120.

The evidence shows that at the time of the accident the train had slacked its speed, as customary, at Waggaman Station, and that on the day and at the moment of the occurrence the train had slacked its speed sufficient for anybody to get off. As Bourman states in his testimony (Tr., p. 44):

> "The foreman said, 'Boys, throw off your tools, and let's get off.' That was before we got to the station, and, when she slacked up, she slacked up slow enough for anybody to get off, and, when I went to get off, she jerked, and I grabbed, and the engineer put more steam to the engine, and that threw me down," etc.

We respectfully submit to your Honors that, before submitting his general charge, which was excepted to by counsel for plaintiff in error, the Judge had heard the testimony which had been taken before him on the first trial, had heard it read to the jury in his presence on the second trial of the case, and was, consequently, fully acquainted with the facts of this case, and had carefully considered the law applicable thereto.

The case being submitted to the jury, it resulted in a verdict in favor of the defendant in error for the sum of $3,000, from which judgment plaintiff in error appealed to the United States Circuit Court of Appeals through a

writ of error directed to the Honorable the United States Circuit Court for the Eastern District of Louisiana.

Upon the trial of this appeal and writ of error (Tr., pp. 73, 74) the United States Circuit Court of Appeals affirmed the judgment of the lower Court for the reasons assigned in their written opinion, which concludes with the following words:

> "It is unnecessary to recite the general charge. We have examined it with care, and we have examined all the testimony with diligence, and we concur in the opinion of the trial Judge that the general charge fully and correctly submitted the proper issue to the jury."

In the case of *McCabe & Steen Construction Company vs. Wilson*, 209 U. S. 275, the Court held:

> "One employed as a fireman on the engine of a construction train, under the circumstances of the case, is not the fellow-servant of the foreman of the gang constructing the bridge which fell and caused the accident.
>
> "It is the duty of the employer to provide a suitable and safe place for the employees to work, and they are not charged with any responsibility in regard thereto, and whereby the employer is relieved if he does everything that prudence requires in that respect. It is largely a question of fact, and the Court will not, in the absence of convincing testimony, set aside the verdict of a jury approved, as was the verdict in this case, by the trial and Supreme Courts of the Territory, especially where the accident was the result of recurring conditions."

In conclusion, we now respectfully once more submit that it is well established by the evidence in the record

and by a careful reading of the Judge's charge as to the law applicable to the case that the several bills of exception presented by plaintiff in error referred to matters foreign to the issue, and that the general charge excepted to was sufficient for all the purposes of the case.

We, therefore, respectfully pray that the writ of error herein issued on the 19th day of March, 1907, be dismissed, with costs.

Respectfully submitted,

A. E. LIVAUDAIS,
ALBERT VOORHIES,

Attorneys for Jonas S. Bourman, Defendant in Error.

OLIVER S. LIVAUDAIS,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

ADDENDA.

The brief for plaintiff in error (pp. 11-14) recites only a portion of the evidence given by the defendant in error at the trial, and deduces therefrom erroneous conclusions of fact. Preceding that part of his testimony quoted in the opposing brief, BOURMAN testified that they were going to Waggaman, which was on their own section, and adds (R., 38):

"Q. Is Waggaman a regular station?
"A. Yes, sir.
"Q. Does the car stop regularly there all the time?
"A. The cars stopped there outside of this cannon ball.
"Q. I am speaking about this cannon ball?
"A. No, sir; she makes no regular stop; only slacks up.
"Q. Does she carry the mail?
"A. Yes, sir.
"Q. How is the change of mail made at that station?
"A. The operator man is standing up with the mail bag in his hand, and he has to throw it into the coach.
"Q. Then, cannon ball then does slack for that?
"A. Yes, sir; the cannon ball slacks at the station for them to do so.
"Q. Do you see the cannon ball slacken up there regularly?
"A. Yes, sir.

* * * * * * *

"A. We had our tools in our hands and stood on the platform.
"Q. What is the distance between Davis station and Waggaman?
"A. I think it is five miles, I think.
"Q. You stood all that time on the platform?

"A. Yes, sir.

"Q. Did the train not blow for the station at Waggaman?

"A. Yes, sir; she blew for the station."

Again, he was asked if he knew whether other employees had been in the habit of jumping from the train when it slacks its speed at that particular station. This question was objected to, and counsel for plaintiff, in response to an inquiry from the court, stated (R., 41):

> "My principal object is to establish, if I can, that this company had established a dangerous practice of jumping off trains; that this thing had been done before to the knowledge of the defendant, and, of course, if they have permitted such a thing as that, it is precedent. If it is negligence at all, it attaches to the fact of jumping from a car going at slow speed; that negligence is the defendant's."

The court thereupon allowed the evidence, which was as follows (R., 41):

> "Q. Do you know whether any other has been in the habit of doing that at that particular station?
>
> "A. Yes, sir; I know it is.
>
> "Q. Do you know that it was so?
>
> "A. If I know one?
>
> "Q. Do you know if it was the custom for employees traveling, coming back from a wreck, or any other position, traveling, to stop at this particular station, and in passing it to jump whilst the train slackened its speed?
>
> "A. Yes, sir; I know.
>
> "Q. Had you seen it done?
>
> "A. Yes, sir; I had seen it done."

Affirming the statement of Bourman that this cannon-ball train only slackened its speed at Waggaman to take on the mail, there is the testimony of CLARA CLEVELAND, who states that she was at the section house preparing breakfast on the

morning of the accident, and standing at the door. Asked about this train, the witness stated (R., 45):

"A. She slows up to take the mail.
"Q. You know that?
"A. Yes, sir.
"Q. Did she slow up to take the mail that time?
"A. It looks like to me she slowed up.

* * * * * * *

"Q. How do they change the mail there?
"A. They throw it on her when she be passing."

This witness also testified to seeing Bourman standing on the step and his subsequent fall, and adds (R., 44):

"Q. How far is that from the place where the accident took place?
"A. Well, I guess it was about as far as from here to out there at the steps.
"Q. When did you see Jonas Bourman first?
"A. He was standing on the steps when I seen him first, with two buckets in his hands.
"Q. What became of him?
"A. When he hit the track I saw him jump off.
"Q. At what?
"A. He held to the step ladder until he got up close to the depot, when I see him fall.
"Q. What happen- to him when he fell?
"A. He got crippled; when I runned out there, I saw he was trying to get up, and his leg was mashed down.
"Q. What became of the train after it run over Bourman's leg?
"A. After it run over him, it runned about from here as far as the door there; and the conductor was coming towards Jonas; and when he got to Jonas he stood by him and he said, 'Back up; I told you I would give you the signal that I had passengers.'
"Q. That was the conductor speaking?
"A. Yes, sir.
"Q. To whom was he speaking?
"A. He must have been speaking to the engineer.
"Q. And he told him, 'I told you——

"A. Yes, sir, 'I told you I would give you the signal I had passengers.'

"Q. That is all he said?

"A. That is all I heard him say."

The witness adds (R., 46):

"Q. How far from the depot was Jonas when he was hurt?

"A. He was right at the depot."

WILLIE HOLMES, who was one of the party, testified (R., 47-48):

"Q. Did not your foreman tell you men in his charge that you were not to jump from that train?

"A. Not to jump?

"Q. Yes.

"A. All the word that I heard him speak of, not to—after this boy was off on the ground—when I came out, he had hold of his brother by the shoulder, and he said, 'do not jump off;' he had hold of his brother by the shoulder at that time.

"Q. Who?

"A. Mr. Hadnott.

"Q. There was another Hadnott there also?

"A. That was his brother Harry.

"Q. He told him not to jump?

"A. Yes, sir.

"Q. Did he not tell you all not to jump; did he not tell you before that time, not to jump?

"A. When we got on the train this is what he replied to us, 'This is our chance to get down; we will go down and get off right.'

"Q. Did he not tell you at some place between Davis and Waggaman, that you were not to jump from that train?

"A. I do not remember that he told the boys on the outside.

"Q. You say you do not remember?

"A. No, sir."

JOE FITZHUGH testified that he was at the depot; saw the train come in; did not see Jonas jump, "but saw him when the train was dragging him. I never saw him jump off." He added (R., 50):

> "Q. How long have you been living at Waggaman?
> "A. I was born and raised in Waggaman.
> "Q. Does the train 52 generally stop at Waggaman station?
> "A. No, sir.
> "Q. How far did the car run after this boy was run over?
> "A. That I cannot exactly say.
> "Q. Well about—before it stopped.
> "A. Before it stopped—she didn't never stop, she just slowed up, and they catch the mail and went off again.
> "Q. But that particular day, after the boy was run over, did the train stop after the accident?
> "A. Yes, sir; backed up.
> "Q. How far did she run before she backed up?
> "A. Well, she did not run very far."

The conductor of the train testified that Waggaman was not a regular stopping place; that he was asked at Davis by the section foreman to let them get on and "he wanted to know if I would stop and put off, or let his men get off at Waggaman, himself and his men, with their tools, and I told him I would" (R., 54).

He then testifies that he went to the engineer and told him that he had taken these men on board and for him to stop and let them get off. After describing the accident, the witness on cross-examination adds (R., 57):

> "Q. How long before reaching the station does the car usually stop, or slack its speed to exchange the mail; how far from the station?
> "A. Right opposite the station where they exchange the mail.

"Q. How far before the reaching of the station do they slack their speed?

"A. Well, they slack it I suppose about 200 or 300 yards; they slow up.

* * * * * * *

"Q. Did you ever see any passenger boarding the train or alighting from the train whilst she had reduced her speed, passing in front of Waggaman station to get the mail?

"A. Yes, sir; I have seen them boarding the train at that place.

"Q. When she slowed her speed?

"A. Yes, sir."

When recalled, the plaintiff in error testified (R., 61):

"Q. The question is, whether there existed such a custom, established or allowed by this railroad company, that you laborers were to alight from their trains, when they slowed or slackened their speed at Waggaman Station? Is it so?"

This question was objected to but admitted.

"Q. Did you do it yourself?

"A. I did it myself.

"Q. Alight from the train while it was in motion?

"A. No, sir; I always did get off the train the same way.

"Q. What way was that?

"A. When she slackened up at the station.

"Q. At what station?

"A. At Waggaman Station.

"Q. You had done it before?

"A. Yes, sir.

"Q. How often had you done it before?

"A. I done it twice before the day the accident happened.

"Q. Did anybody else do it with you to your knowledge?

"A. The laborers and foreman got off the same way as I did—slackened at Waggaman, Willie Holmes got off the same way with me, coming there too."

It is plain from this testimony that the plaintiff in error and his associate workmen on this section had been using this train, and jumped therefrom when it slowed up at Waggaman to take on the mail. It is also plain that, on this particular occasion, neither plaintiff in error nor any of his co-workmen were informed by the section foreman, Hadnott, that the train would be brought to a stop at Waggaman, permitting them to alight. Hence, the remark made by Hadnott to the plaintiff in error and other laborers standing with him and Hadnott on the platform, when the plaintiff in error started to get off the train, to wit, "Boys throw your "tools off and let us get off" (R., 39), and again (R., 49), was naturally taken by plaintiff in error to mean that they should jump off when the train slackened at Waggaman for the purpose of taking on the mail.

There is no evidence to show that plaintiff in error was advised by anyone that the train would stop at Waggaman. He had the clear right to infer that he was to follow the custom of the section men, and that his foreman, in using the language when the train slackened—"Boys throw your tools off and let us get off," meant that they should all jump when the train was slowed down for the purpose of taking on the mail.

The direction to throw off their tools was unnecessary if the train was to *stop*. Plainly the direction "throw your tools off and let us get off" meant that they should get off while the train was slackening its speed, as was the habit or custom to take on the mail. The entire record fails to disclose that this plaintiff in error could have taken the language used by the foreman as having any other meaning than to get off when the opportunity came by the slackening of the train.

Under such plain facts, we submit this is not a case of contributory negligence, nor governed by the rule against liability for acts of fellow-servants. In truth, it is a case of a poor, ignorant colored man, working as a section hand, who,

when told by his boss, with the others, to throw off their tools "and let us get off," understood his boss to mean that they should take advantage of the slowing down of the train and all jump off, the plaintiff in error being the first in line.

The suggestion of opposing brief that the foreman told anyone *not* to jump must be read in the light of the testimony quoted above, and given by Willie Holmes (one of the party, R., 47), who testified positively that all he heard the foreman say "was *after this boy was on the ground,*" when the foreman had hold of his brother by the shoulder and then said "do not jump off." Clearly, he had given no such instructions and made no such remark prior to that instant.

The conductor of the train testified (R., 55) that Bourman fell opposite the station house; the train "proceeded "about three car lengths at the place where he fell; there "were six cars on the train" and plaintiff in error got off from the rear platform of the third car, and yet when he fell and was injured, the conductor says the rear sleeper was "directly opposite to him at that time."

The conductor states he reached him in a moment and asked him why he jumped; "I asked him if he was told to jump off and he said he just thought the train would not stop."

From this evidence it is plain that the plaintiff in error had not been told that the train would stop and certainly had not been told *not* to jump off.

In *Railroad Company v. Jones* (95 U. S., 439, 442), the rule of contributory negligence is most concisely and admirably stated in the opinion announced by Mr. Justice Swayne as follows:

> "One who by his negligence has brought an in-
> "jury upon himself cannot recover damages for it.
> "Such is the rule of the civil and of the common law.
> "A plaintiff in such cases is entitled to no relief.
> "But where the defendant has been guilty of negli-
> "gence also, in the same connection, the result de-
> "pends upon the facts. The question in such cases

"is: 1. Whether the damage was occasioned entirely "by the negligence or improper conduct of the de- "fendant; or, 2. Whether the plaintiff himself so far "contributed to the misfortune by his own negli- "gence or want of ordinary care and caution, that "but for such negligence or want of care and cau- "tion on his part the misfortune would not have hap- "pened."

Hence, whether plaintiff in error was here guilty of negligence was *the* matter directly in issue, and as the case cited declares, "depends upon the facts."

The charge of the trial court in the instant case was in every sense fair and just in dealing with this question. The court instructed the jury on that point as follows (R., 24-25):

"The burden is on the plaintiff Bourman to make "out his case by a preponderance of credible proof. "He must show that the defendant, the Texas & "Pacific Railway Co., committed the fault stated in "the petition or was negligent as stated in the peti- "tion and that that fault or negligence was the direct "and proximate cause of the plaintiff's injury.

"It was the duty of the defendant Railway Com- "pany to use ordinary care in affording the plaintiff "a reasonably safe opportunity of landing at Wagga- "man Station. The main question for you to decide "is, did the defendant Railway Co. afford the plain- "tiff such an opportunity?

"If the defendant did not do so and if the plain- "tiff did not contribute to his own injury by his own "negligence, and did not assume the risk of alight- "ing at Waggaman in the manner in which he did, "then the defendant Railway Co. would be liable to "him for his injury.

"The burden of proof is on the defendant Railway "Co. to show by a preponderance of proof that the "plaintiff contributed by his own negligence to his "injury, that is to say, that by his negligence he "helped or assisted in any way in bringing about his "injury. If he did so, he cannot recover, however

" much the defendant Railway Co. may have been " negligent.

"In the same way, the burden of proof is on the " defendant Railway Co. to show that the plaintiff " assumed the risk of alighting as he did. If the " plaintiff assumed the risk, he cannot recover, how- " ever negligent the defendant Railway Co. may have " been.

"I understand that it is contended for the defend- " ant Railway Co. that the train was ordered to stop " and did stop to put off the plaintiff and his fellow " laborers at Waggaman. I also understand that " on behalf of plaintiff it is contended that the train " did not stop at Waggaman for the purpose just " stated and that it only stopped after and because of " the injury to plaintiff. All of that is matter ex- " clusively within your province, as well as the mat- " ter whether or not plaintiff was told or ordered by " the foreman to get off while the train was in " motion.

"The mere fact that the foreman would have or- " dered the plaintiff to get off while the train was " moving (if he gave such an order) would not of " itself entitle the plaintiff to recover. The plaintiff " should not have obeyed such an order if it was " so dangerous that an ordinarily prudent man would " not have obeyed it. You would have to consider " and decide whether under all the circumstances the " plaintiff (assuming the order was given) con- " tributed to his own injury by his negligence in " obeying the order or assumed the risk involved in " obeying it.

"But I repeat to you that it was the duty of the " defendant Railway Co. to afford the plaintiff a " reasonably safe opportunity to alight at Wagga- " man.

"Therefore, if you find that the defendant Railway " Co. failed in this duty, that the failure was the " direct and proximate cause of the plaintiff's in- " jury, that the plaintiff did not assume the risk, and " that he did not contribute in any way to his injury " by his own negligence, then you should find in " favor of the plaintiff for such damages as he has " suffered."

The charge, therefore, clearly put to the jury for consideration and determination upon the facts (1) the question whether the plaintiff in error was guilty of negligence, and (2) whether the defendant company failed in its duty toward him in not causing the train to be stopped for his safe alighting therefrom. It was contended for the plaintiff in error that the train was not stopped at all for the purpose of allowing him to alight, and the contrary was claimed for the railroad company. The jury were hence the sole judges of that fact and their verdict in favor of the plaintiff in error was necessarily a finding (1) that he was not guilty of negligence in fact, and (2) that the train was not stopped to enable him to alight, but only stopped because of the accident which happened to him.

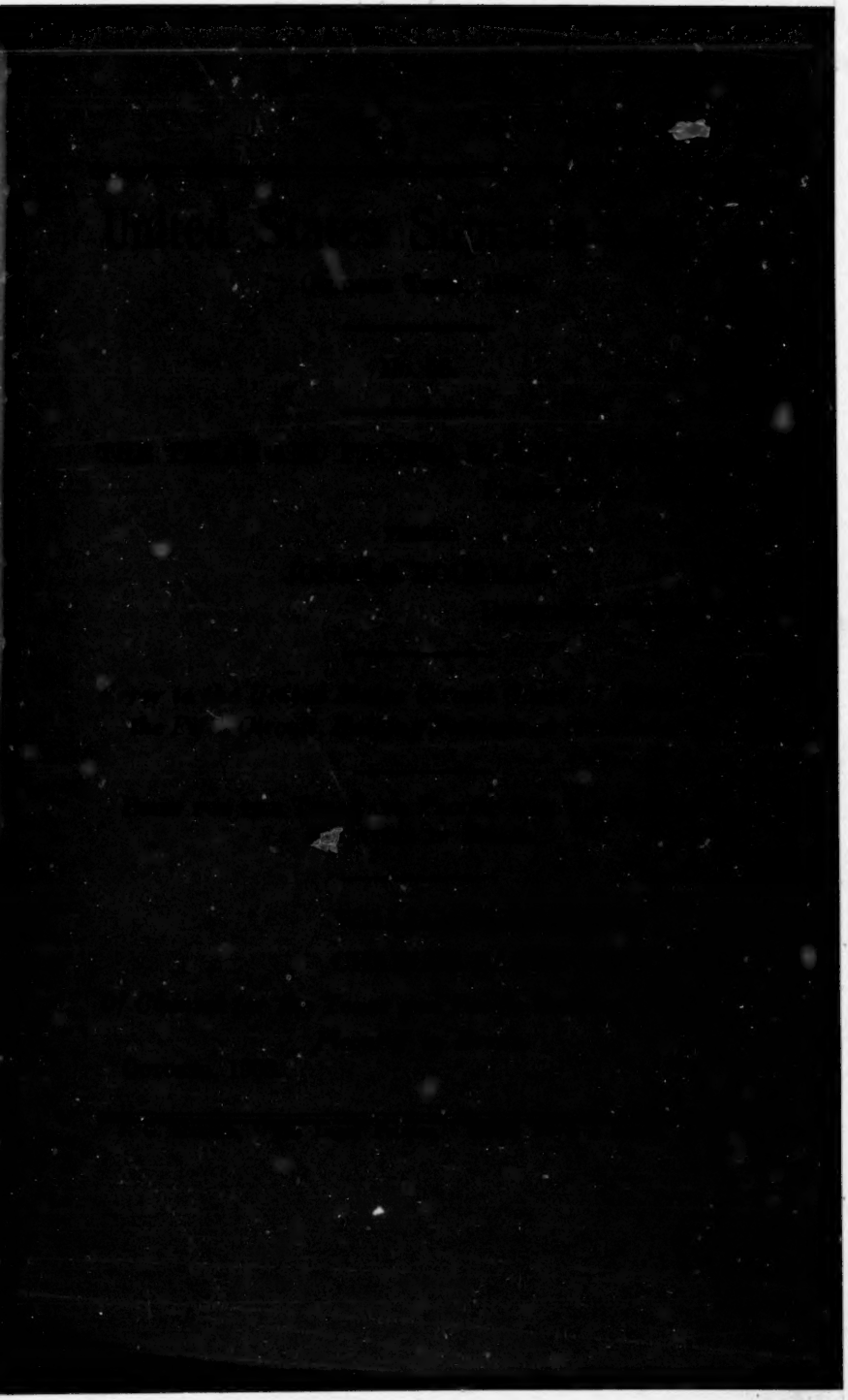
It is plain that the question of negligence, arising from acts of fellow-servants, with their resulting legal effect, is not pertinent to this case. There is conflicting testimony as to whether the company did or did not permit the custom of alighting from and jumping aboard this train when it slackened speed at Waggaman for the purpose of taking on the mails. The verdict of the jury must, therefore, have embraced that issue, and the legal effect of the verdict was to find that the company did permit precisely such habit or custom. The assumed negligence of the conductor or engineer of the train, or both, is hence in no sense controlling.

The errors alleged in the refusal of the trial court to charge the jury in respect of the negligence of either, or both of them, and the exoneration of the company from liability therefor, are plainly unsound. The charge of the court was direct and plain, and is not justly subject to the criticism made on the opposing brief as being "a highly abstract charge." For the charge in terms directed the jury that if they found the defendant Railway Company failed in the duty of giving the plaintiff in error an opportunity to safely alight, and he was not found guilty of negligence, then their verdict should be for the plaintiff. There is nothing in the

charge to mislead the jury upon the law. The testimony as to the practice of jumping off and on this train at Waggaman was before the jury and part of the issue in the case. To hold that the judgment should be reversed upon the grounds set forth on the opposing brief, would be in effect to say that, notwithstanding these issues of fact were all made up and submitted to the jury, their verdict thereon must be ignored and the resulting judgment reversed.

A. E. Livaudais,
Albert Voorhies,
Oliver S. Livaudais,
Attorneys for Defendant in Error.

Aldis B. Browne,
Alexander Britton,
Of Counsel.



United States Supreme Court.

OCTOBER TERM, 1908.

No. 56.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VERSUS

JONAS S. BOURMAN,
DEFENDANT IN ERROR.

Error to the United States Circuit Court of Appeals for the Fifth Circuit, Holding Sessions at New Orleans.

BRIEF FOR THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This action to recover damages for personal injuries was originally instituted in the District Court of the State for the Parish of Jefferson, Louisiana, and was removed

by the railway company to the Circuit Court of the United States for the Eastern District of Louisiana. (Tr., pp. 1-10.) The case was twice tried in the Circuit Court. At the close of the evidence on the first trial the Court sustained a motion made by the defendant railway company for the direction of a verdict in its favor, but thereafter it granted the plaintiff Bourman a new trial. (Tr., pp. 15-19.) On the trial so granted, the Court, on the same evidence, denied the motion for a peremptory instruction made by the railway company, and also denied certain special charges requested by it. Separate bills of exception were duly reserved to its action, both in refusing the peremptory instruction and in refusing such special charges, and certain of the bills so taken, together with a further bill reserved to a portion of the general charge, constitute the basis of the assignment of errors made in the Circuit Court of Appeals, and thereafter made on the writ of error from this Court.

The plaintiff finally recovered a verdict for three thousand dollars on the second trial in the lower Court, and judgment was entered thereon after a motion for a new trial had been duly made and overruled. (Tr., pp. 21-65.)

The case was taken by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, holding sessions at New Orleans, where it was argued on the assignments of error found at pages 65 to 68, and the judgment affirmed in a *per curiam* "statement" found in the transcript at pages 73 and 74.

Thereupon the case was removed to the Supreme Court of the United States by writ of error, and an assignment of errors was filed. (Tr., pp. 75-79.)

The case made by the pleadings is substantially as follows: Bourman, plaintiff in the lower Court, on the 2nd day of December, 1901, was employed by the railway company as a section laborer, and was one of a small gang of which one by the name of Hadnott acted as foreman. There seems to be some discrepancy as to his name in plaintiff's petition, where he is called Hardy (p. 3); but in Bourman's testimony it would appear that his name was Hadnott (p. 38). On the date mentioned a wreck occurred at Davis Station, on the defendant's line, and a small gang of section hands, of which Bourman was a member, was taken from Waggaman Station to Davis, a distance of about five miles, to assist in removing débris. The gang finished work at evening, and, in order to get back to Waggaman, boarded one of defendant's passenger trains, known as No. 52, and sometimes called the "Cannonball," doing so under the direction of Hadnott. At this point in the narrative the petition of plaintiff in the lower Court contains the following allegations, which are supposed to contain the gravamen of the case:

> "That, acting under said instructions, your petitioner, who was carrying his tools (three shovels), together with his companions and his said foreman, boarded said train No. 52, having been told by their said foreman to alight at Waggaman Station; that the trains of the defendant company in their daily

run are known to slack their speed at Waggaman Station for the mail, and that, on that particular occasion, their agents and employees, knowing that there were railroad laborers on board to be put off at that station, were in duty bound to stop their train at such station, or at least to slacken speed sufficiently to allow them to throw their tools and to alight when the train arrived at this station.

"Petitioner represents that, upon the train arriving at said station, he having, as instructed by his foreman, thrown his tools, and being prepared to alight, was standing on the lower step in front of the colored coach prepared to alight by extending his left leg towards the front, or direction of motion of said train, as customary when alighting from a car running at slow speed; that, at that moment, his co-laborers, named C. B. Lawson, Henry Hardy, Willie Holmes, and Willie Hardy, their foreman, were standing on the adjoining ascending steps immediately above your petitioner, ready to follow your petitioner as he alighted when the train had slackened its speed, and as instructed by his foreman; that, the train being about to pass the station, your petitioner had no further alternative than, when ordered by his foreman, to jump from the moving train, which just then increased its speed, and whose momentum, upon his left foot touching the ground, carried his body on a run of four or five paces, when he fell down forward and his right leg, extended on the track, was run over, cut, crushed and mangled by the rear wheel of the coach next following on the train."

Some of these allegations are incorrect, and some are irrelevant. The real facts of the case, as abundantly and clearly shown by the evidence, which is all incorporated

in the bills of exception, are that, after Bourman finished his work that day, he, with his fellow-workmen, boarded the passenger train No. 52, known as the "Cannonball," to return from Davis to Waggaman, a distance of about five miles. The foreman explained the situation to the conductor of this train. The conductor of the train then notified the engineer that he must stop at Waggaman to let these workmen alight, and he did so stop the train at Waggaman (pp. 54, 55); but Bourman placed himself on the lowest step of the third car, and swung himself off while the train was still moving at the rate of from eight to ten miles an hour, and before it stopped, and was thus hurt. He was not ordered by the foreman, or by anyone else, to jump off while the train was still moving, as will be fully seen hereafter in this brief. He voluntarily and unncessarily put himself in a place of danger, and swung himself off in a dangerous way. If the train gave a jerk at that moment while slowing up, it was a common incident, under such circumstances, which could not have hurt anyone who exercised the most ordinary care by waiting for a full stop and then alighting. Nor can it be claimed that the conductor or engineer of the train had the slightest knowledge of Bourman's dangerous position and movements; and, as for the alleged orders to jump off, there were none; and the only real testimony as to jumping off is that the foreman called out to one of the squad "not to jump," meaning not to jump while the train was still moving and had not come to a standstill.

The railway company first excepted that the petition disclosed no cause of action, and, this exception being overruled, it answered with a general denial, an admission of plaintiff's employment on the date of the alleged injury, a plea that his injury was caused by his own negligence, and a further plea that he was injured, if not by his own negligence, by the act, neglect or fault of his fellow-servants, the risk of injury from which he had assumed. (Tr., p. 11.) A supplemental and amended answer was filed, amplifying the pleas of negligence on the part of Bourman and negligence of his fellow-servants theretofore set up, and averring that the plaintiff was injured either by his own voluntary act in unnecessarily jumping from the train while in motion, or by the act or default of the foreman, in whose charge he was, in ordering and requiring him to jump (if such an order was given, which was denied), or by the neglect and default of the conductor and engineer of said train in failing to seasonably stop the same in order that Bourman might have an opportunity to alight (if they did so fail, which was denied) (p. 13). On the trial, the plaintiff in the lower Court having attempted to prove a "custom" of slacking up the train and letting laborers jump off, the railway company filed a further answer, denying the existence of any such custom, and averring that, if it existed (which was not admitted at all), then that Bourman well knew of the same, and of the risk connected therewith, and assumed such risk. All the evidence in the case is annexed to the bills of exception, and found in

the transcript at pages 27 to 63. It will be referred to in connection with the several assignments of error pressed in this brief, which are as follows:

ASSIGNMENT OF ERRORS.

1.

"That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against the Texas and Pacific Railway Company, plaintiff in error, and in favor of the defendant in error, upon the trial of said cause."

2.

"That the said Court erred in holding that the Circuit Court committed no error in denying the motion of the Texas and Pacific Railway Company, upon the trial of said action, to direct a verdict in its favor at the close of all the evidence and testimony in behalf of both parties in the case."

3.

"That the said Court erred in holding that the Circuit Court committed no error in refusing the following special charge requested by the plaintiff in error, defendant in the Court below—to wit:

" 'I charge you that a locomotive engineer has, in the absence of notice to the contrary, the right to assume, whilst handling his train, that persons being conveyed thereon will not attempt to alight while such train is in motion. If, therefore, you find from the evidence that

the train which caused the injury was jerked or started forward by the engineer prior to being brought to a full stop at Waggaman Station, and just at, or prior to, t moment that the plaintiff undertook to jump there then the act of the engineer in so jerking or stopping said train was not such negligence as entitled the plaintiff to recover in this case,' and erred in holding that the matter contained in said special charge was contained in, or covered by, the general charge of the trial Court."

4.

"That the said Court erred in holding that the Circuit Court committed no error in refusing to give to the jury, at the request of the plaintiff in error, defendant in the Court below, the following special charge—to wit:

"'If you find from the evidence that the plaintiff's injury was caused by the negligence of the engineer of the train on which plaintiff was being transported, and not by the plaintiff's own act or negligence, then I charge you that the negligence of said engineer was the negligence of the plaintiff's coservant, the risk of which the plaintiff assumed, and your verdict must be for the defendant'; and erred in holding that the matter of said special charge was covered by, or contained in, the general charge of the trial Court to the jury in said cause.

5.

"That the said Court erred in holding that the Circuit Court committed no error in refusing to give to the jury,

at the request of the plaintiff in error, defendant in the Court below, the following special charge—to wit:

"'The risk of jumping from a train moving at a rate of from eight to ten miles an hour is a clear and obvious one, and, if you find from the evidence that the plaintiff undertook to jump from a train moving at that rate of speed, and was injured thereby, then he was negligent in so doing, even if ordered by Hadnott so to do, and cannot recover in this case for such injury'; and erred in holding that the matter of said special charge was contained in, or found in, the charge of the trial Court to the jury on the trial of said cause."

6.

"That the Court erred in holding that the Circuit Court committed no error in using, in the course of its general charge to the jury, the following language—to wit:

"'It was the duty of the defendant railway company to use ordinary care in affording the plaintiff a reasonably safe opportunity of alighting at Waggaman Station. The main question for you to decide is, Did the defendant railway company afford the plaintiff such an opportunity? If the defendant did not do so, and the plaintiff did not contribute to his own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant railway company would be liable to him for his injuries. * * *

"'But I repeat to you that it was the duty of the defendant railway company to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

"'Therefore, if you find that the defendant railway company failed in this duty, that the failure was the direct and proximate cause of plaintiff's injury, that the plaintiff did not assume the risk, and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he has suffered.'

"Wherefore, the Texas and Pacific Railway Company prays that the judgment entered herein against it may be set aside and reversed, and that a judgment in its favor may be entered, as prayed in its answer."

ARGUMENT.

First Point.

The first and second assignments of error made on this writ, and copied above, may be taken up together. The learned Judge of the Circuit Court, on the first trial, directed a verdict for the railway company, and such verdict was accordingly rendered. (Tr., p. 15.) On the second trial, the counsel for the railway company again moved the Court to direct a verdict for the defendant, but the learned Judge felt constrained to overrule the motion, and an exception was reserved. (See memorandum, p. 23, and Bill of Exceptions No. 1, p. 27.)

We submit that the direction of the verdict on the first trial by the learned Judge was entirely correct, and his refusal to grant a similar motion upon the same testimony on the second trial was distinctly erroneous.

(a) There is no evidence that plaintiff's injury was due to any negligence on the part of the railway com-

pany. It may be now considered as settled and elementary, as stated in **Looney vs. Metropolitan R. R. Co., 200 U. S. 430-478,** that "a plaintiff, in the first instance [in such a suit as this], must show negligence on the part of the defendant." The negligence of a defendant, as stated in that case, cannot be inferred from a presumption of care on the part of the person injured. A presumption in the performance of duty attends the defendant as well as the person injured. "It must be overcome by direct evidence."

In the case at bar, therefore, the presumption of duty on the part of the railway company attends that company in its operations, and we look in vain in this case for any proof of actionable negligence on the part of the railway company. There is no proof, or even pretense, that the railway company did not provide a safe place to work, that the appliances were not safe, or that there were any of those defects in machinery, track, platforms or the like which sometimes afford grounds of complaint, as considered in the case of **Choctaw, etc., R. R. Co. vs. McDade, 191 U. S. 64.**

Nor is there any proof of negligence on the part of any employee of the railway company, except Bourman himself.

See **Coyne vs. Union Pac. Ry. Co., 133 U. S. 370.**

(b) It is obvious that, even if the evidence did show any negligence on the part of defendant's employees other than Bourman himself, then it was the negligen of plaintiff's fellow-servants.

(c) The legal effect of the petition of the plaintiff below and the testimony adduced in the case show that he was injured by his own carelessness in undertaking to jump from a moving train while it was still going at the rate of eight to ten miles an hour; that he assumed the risk of injury in so jumping, and that, even if there was some fault on the part of some employee of the railway company other than Bourman (which we deny), such fault could not have caused any injury, in a legal sense, unless the carelessness of Bourman himself had contributed to the result.

The theory of plaintiff in the lower Court, from the beginning, was that he was *ordered* by the foreman of the gang to jump from a moving train, and was injured in obeying the order, but on this point his case breaks down at once, and for several reasons. He was never ordered to jump off the train while it was in motion. His own account of the affair shows this. (Tr., pp. 38, 39.) The train had blown for Waggaman, and then the plaintiff states:

Q. How did she blow?
A. She blowed one long whistle and one short whistle.
Q. What did you do, then, when you heard that?
A. When she blew for the station we all got on the steps, with our tools in our hands.
Q. You moved down the steps?
A. Yes, sir; she was slacking up speed.
Q. She was slacking up speed?
A. Yes, sir.
Q. On what step were you standing?

A. I was standing on the step right in front of the white coaches.

Q. I say on what step of the ladder?

A. The last one downstairs.

Q. What made you get there?

A. Well, that was the way to get off when we was to get off at the depot.

Q. How did you happen to leave that position? You know, you were standing on the steps. Were you holding on to anything?

A. Yes, sir; holding on to the rod of the step.

Q. What made you lose that position? Standing on the last step, holding the rod, what made you lose that position?

A. What made me lose that position?

Q. Yes?

A. To get off the train when she drew up at the depot.

Q. What happened immediately when you started to go off the train?

A. The foreman said, "Boys, throw your tools off, *and let us get off.*" That was before she got to the station; and, when she slacked up, she slacked up slow enough for anybody to get off, and, when I went to get off, she jerked, and I grabbed, and the engineer put more speed to the engine, and that threw me down, and I could not let go, and she dragged me along until I got weak in the arms and let go, and tore my arm.

Q. What was the cause of that jerking manner? You say she was running slow?

A. She was running slow, and she slacked up speed, and then she let go again, and she made a jerk.

Q. That was what you meant. She started off and increased her speed?

A. Yes, sir; after she slacked she started up again.

Again, at page 42, Bourman continues:

Q. You say you were talking to Hadnott?
A. I was talking to Hadnott.
Q. Were you not talking to Hadnott before you were hurt?
A. We were all there talking.
Q. Were you talkng to him?
A. No, sir; not to him personally.
Q. Did he speak to you?
A. No, sir; he did not.
Q. He said nothing to you at all?
A. When we were on the way coming we were all speaking, but, when the train slacked up—when they blew the whistle for the train to stop at the depot—he told us, "Boys, get your tools; we will get off."
Q. That was while she was slacking up?
A. Yes, sir.
Q. You say you jumped when the train slowed at the depot?
A. Yes, sir.
Q. That was before it stopped?
A. She was not going to stop there at all.
Q. You did not know that just before she stopped?
A. Well, she did not stop at all.
Q. You jumped while the train was moving?
A. Yes, sir.
Q. Then you say that the train started up suddenly?
A. Yes, sir; at the time I was getting off, she jerked; before I jumped loose.

It is obvious that the language of the foreman as thus reported is a mere suggestion or reminder that the squad was to alight at Waggaman. It is not in the imperative mode at all as to the matter of getting off. It was not

addressed especially to Bourman, as he admits (p. 42), and there is no reason to suppose that he considered the remark as savoring of coercion or command, or that it in any way affected his volition or his judgment. It follows, then, that the learned trial Judge was in error in holding that the case should be controlled by the decision in **Northern Pacific Ry Co. vs. Egeland, 163 U. S. 93**, in which Mr. Justice **Peckham** delivered the opinion of the Court. (See Tr., p. 18, for the opinion of Judge Parlange in granting the new trial.) We submit that the case of Egeland is quite different, and is not in point. There the train had slowed down as it came to the station, and was running between four and five miles an hour, when Potter, the conductor, gave orders to the men to get off. Three of the crew jumped down upon the platform of the station, which was about a foot below the car-step. They landed safely, and plaintiff was then ordered by Potter, the conductor, to jump. He landed on the platform, and then in some way fell and hurt himself. He jumped because, it was said, he was told to by the conductor, and because he thought he could do so safely, or the conductor would not have given the order. He relied on the conductor's direction at the time he jumped, and at that time the train, which had been slowing up, was going not faster than four miles an hour. The trial Judge in that case instructed the jury that the plaintiff, in order to excuse the act, must satisfy the jury that Potter ordered and directed him to so jump, and also that

the order was calculated to divert his attention from the danger of jumping, or that the order created a situation that interfered with his free agency to some extent, and such order created a confidence that the attempt could be made with safety.

Plainly, this **Egeland case** is not in point against us. The conductor (Potter) governed the train and its movements, and the movements of the train crew, and the jury seem to have found, under the directions of the trial Judge, that the facts alluded to by the Judge existed as an excuse for jumping off the train while it was moving at the rate of four or five miles an hour.

But in the case at bar there is no such situation. The conductor of train No. 52 gave no orders to anybody, except to the engineer to stop at Waggaman. He did not order Bourman to jump off while the train was still moving, nor did the foreman give any such order. The free agency of Bourman was not interfered with, nor was there anything in what was said or done to create a confidence in Bourman's mind that the attempt could be made with safety.

Moreover, in the case of Egeland, three of the crew had already jumped off safely, and this fact was referred to the jury as part of the evidence, a fact that is not found in the case at bar. Moreover, in the case of Egeland, the trial Judge charged, among other things, as follows:

> "If the order [to jump] was not given, and he voluntarily jumped off the train, seeing that the others

had done so in safety, and he thought he could do the same, then he took the risk, and if, in consequence of so jumping, he was injured, he could not recover, because it would be contributory negligence on his part."

Now, in the case at bar the order to jump off was not given, and Bourman voluntarily jumped off without any example on the part of others, and when the train was running at about twice the speed mentioned in the case of Egeland.

In the **Egeland case** two decisions were referred to by this Court, and carefully distinguished with that skill which is so important in the art of judging. They are **Railroad Company vs. Jones, 95 U. S. 439**, and **Kresanowski vs. Northern Pacific Ry. Co., 18 Fed. 229.** In each the injured person was riding on the pilot; the danger was obvious; in neither case "was there in truth an order to ride on the pilot"; and it was said that such an order, even if given, would have been no excuse (p. 97). We refer to these two cases as distinctly in our favor. If the railway company has been properly condemned in the case at bar, it follows that railways must pay damages to every injured employee, and this is the *reductio ad absurdum.*

The remark, "Boys, get your tools; we will get off," is properly susceptible only of meaning that the plaintiff was to get off when the train stopped; and, standing unqualified as it does in the record by any evidence showing that it was in the nature of a command, and intended

to be at once acted upon, and the burden of proof being on the plaintiff to make his case certain, the Court ought to have held and directed the jury that the plaintiff had failed to show any negligence on the part of the foreman.

A case in point is **Davis vs. Western Ry. Co., 107 Ala. 627 (18 So. 173).** Plaintiff went between two moving cars, and attempted to justify his doing so by alleging an order of his foreman. This order was simply to "cut off one car." There was no emergency attending the order, nor necessity for plaintiff to go between the cars while in motion. The Court said:

> "Unless the order itself implied to the contrary—and its terms and the circumstances do not do so—we are to presume it was intended by the foreman that the plaintiff should comply in a manner safe to himself. **(Railroad Co. vs. Bevins [Ala.] 15 Southern, 515-518; Pennsylvania vs. Hankey, 93 Ill. 583.)** * * * If the order given by the foreman, however, were construed as one to the plaintiff to uncouple the cars while in motion, it may be said that plaintiff was under no obligation to obey it without assuming the risk himself, if by so doing he incurred the risk of obvious perils, such as a reasonably prudent man would regard as extra-hazardous. That plaintiff did incur such risk is beyond question." (Authorities.)

Nor was there any negligence shown on the part of the engineer. The testimony shows without dispute that the plaintiff undertook to jump while the train was in motion and running at from eight to ten miles an hour (Tr., p. 67), and before it had ever been brought to a stop. It entirely fails to show that the engineer had any

notice that the plaintiff was on the steps of the car, or intended to jump at any time prior to the jerking of the train, which, he says, caused him to lose his balance on the lower step. The engineer had, under the circumstances, a right to assume that the plaintiff and his co-laborers were where they should have been—to wit, in the coaches—and had no reason to anticipate that a jolting or jerking in the bringing up of his train was likely to produce the consequences to the plaintiff that it did; and, furthermore, this jolt or jerk was not shown by any evidence on the part of the plaintiff to have been of any unusual or extraordinary or unnecessary force, and it ought not to have been assumed by the trial Court that negligence was shown, nor should the jury have been permitted to infer negligence in the operation of the train from the fact that it had sustained some sort of a jerk in the course of its approaching the station, and before it had ever come to a stop, and an invitation been thereby extended to the plaintiff to alight.

Under the circumstances, the plaintiff's injury was not the natural or proximate consequence of the engineer's act or omission (if there was any act or omission on his apart) in causing the train to jerk. The liability for negligence is, we understand, in all cases dependent upon its capability of being foreseen by a reasonable man under the circumstances of the particular case.

> "The doctrine of natural and probable consequences is most clearly illustrated, however, in the law of negligence, for there the substance of the wrong itself is the failure to act with due foresight.

It has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that, if, in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

Webb's Pollock on Torts, pp. 42-44.

Tested by this rule, the engineer was not bound to foresee that the plaintiff was on the lower step of the coach with one leg extended at the time the jolt occurred, nor, indeed, to foresee that he would be anywhere except where he should have been—in the coach; and the plaintiff's injury was not, therefore, the probable and natural consequence of the engineer's act.

Again, as heretofore recited, the plaintiff testified:

"* * * And, when I went to get off, she jerked and I grabbed, and the engineer put more speed to the engine, and that threw me down, and I could not let go, and she dragged me along until I got weak in the arms and let go and tore my arm." (Tr., p. —.)

There was, however, no evidence of any description that the jerk so testified to was in any way due to the negligence of the engineer.

A case precisely in point is **Etson vs. Belle Isle Ry. Co., 110 Mich. 494 (68 N. W. 298)**. The plaintiff was a street-railway passenger. He testified that, being informed that he was about to reach his destination, he went to the rear platform of the car and took hold of the brass handles on the side of the car to be in readiness to alight when the car came to a full stop; that the car had nearly stopped when, without warning, "it gave a sudden jerk and went ahead again," and he was thrown from the platform and run over by the trailer attached to the car. There was no evidence as to what caused the jerk. The Court, in deciding that a motion to direct should have been granted, said:

> "The defendant claims that there was nothing to show that the jerk of the car was not occasioned by some cause for which defendant was not to blame, as in the case of **Bradley vs. Railway Co., 94 Mich. 35.** That case held that one thrown from a car by a sudden jerk must produce evidence tending to show that such sudden jerk or motion was due to the negligence of the defendant. The Court said:
>
> " 'The difficulty is that there is nothing in the case showing, or tending to show, to the jury just what caused him to fall off. It might have been a sudden jolting of the cars, for which the conductor or driver was in no manner responsible; at least, it is not made to appear by any affirmative testimony that the defendant company neglected any duty, except to stop when first signaled; and it does not appear that that caused the injury; but, upon plaintiff's own

theory, it was a sudden jerk, from what cause no one pretends to know. We think there was no evidence to go to the jury on this point.'

"The same might be said here with equal propriety. * * * Unless we are to say that the fact that the motive power was electricity, instead of horses, warrants the application of a different rule, the cases are identical. We are at a loss for a good reason for so holding. The jerk might as easily be caused by a jolt or taking off brakes in the one case as in the other; and there is as much room for the presumption that it was not in this case as in that. Again, if we could assume that the car was started suddenly by the application of power or the removal of the brakes, there is nothing to indicate an improper use of either. The car was not at a proper place to stop, but had nearly stopped. To propel it to the usual stopping place, beyond the second walk (if such was the regulation), the application of power or the removal of the brake was necessary—possibly both. It is a natural law that inertia is not instantly overcome, and that a start or accelerative motion tends to throw down one riding on a car. We cannot say that it was negligent for the plaintiff to stop upon the platform at the time that he did, because it is a daily occurrence of the usual practice for people to do so; but, on the other hand, if it were not negligence for him to be there when the car was in motion, it is difficult to see how it could be negligence on the part of the company to run its car to the usual stopping place, although he was upon the platform. The car had a guard in the rear and a handle on the edge, and ordinarily a person is reasonably safe when upon the platform. At all events, it would be unjust to hold that, by venturing upon the platform when the car is in motion, the passenger can impose upon the company an obligation of instantly stopping or not accelerating the motion of the car."

And in **Sansum vs. Southern Railway Co., 111 Fed. 887 (C. C. A. 1901)**, it was held that a sudden, unexplained lurch of a train, which threw a passenger from a platform of one of the coaches, did not justify the inference of negligence, and the action of the lower Court in directing a verdict for the defendant was accordingly approved.

We submit, therefore, that there was no evidence of negligence on the part of the engineer which could justify the submission of the case to the jury.

The undisputed evidence shows, as above stated, that the train, at the time the plaintiff jumped, was moving at the rate of from eight to ten miles an hour. (Tr., p. 56.)

No risk could be more obvious than that taken by the plaintiff in undertaking to jump from a train running at that rate of speed. **(Southern Pacific Ry. Co. vs. Johnson, 169 Fed. 559; Kreaanowski vs. N. P. Ry. Co., 18 Fed. 229; Davis vs. Western Ry. Co., 107 Ala. 627, 18 So. Rep. 173)**, and he is amenable to the principle that

> "a servant is deemed to accept the risk where he has the same knowledge or means of knowledge of the danger that the master has."
>
> **Thompson, Negligence, Sec. 4643.**

And, if the risk is obvious, the fact that it is undergone by the servant at the master's command does not expose the latter to liability.

> "The liability upon the master, in cases of injury to the servant received in a dangerous employment

outside of that for which he had engaged, arises [therefore] not from the direction of the master to the servant to depart from one's service, and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to appreciate the danger."

Reed vs. Stockmeyer, 74 Fed. Rep. 186 (C. C. A. 1896).

Coosa Mfg. Co. vs. Williams, 133 Ala. 606 (32 So. Rep. 232); McClellan, Ch. J.

(d) Assuming that the plaintiff produced sufficient evidence to justify the submission of the question of negligence to the jury, the negligence, if any, which was the direct and proximate cause of the injury was the negligence of the engineer, and such engineer was a fellow-servant of the plaintiff. The plaintiff alleged that he was standing on the lower step of the coach "prior to alighting, by extending his left leg toward the front, or direction of motion, of said train, as customary when alighting from a car running at slow speed." (Tr., p. 3.) The testimony already quoted shows that the jerking of the train caused the plaintiff to lose his balance, and to be dragged, and he himself says that, but for the jerking, he would not have been hurt. (Tr., p. 48.) If such jerk can be attributed to the negligence of the engineer, then such negligence was, on the plaintiff's own theory, that of a fellow-servant, and showing the proximate cause of the injury, and, being so, he had no case. After the many decisions on the subject, it would seem super-

fluous to cite authorities to this Court to show that a section laborer and a locomotive engineer are fellow-servants.

> **Louisville & Nashville R. R. Co. vs. Stuber, 108 Fed. 934 (C. C. A. 1901).**
> **Thom vs. Pittard, 10 C. C. A. 352 (67 Fed. 232).**
> **Northern Pac. R. R. Co. vs. Charles, 162 U. S. 359.**
> **Baltimore & Ohio R. R. Co. vs. Camp, 13 C. C. A. 233 (65 Fed. 962).**
> **Martin vs. Ry. Co., 65 Fed. 384.**
> **Coulson vs. Leonard, 77 Fed. 538.**

We do cite them, however, out of deference to the learned trial Judge, who declined throughout this case to recognize that the fellow-servant doctrine was at all involved. We believe that his failure to recognize and apply that doctrine was due to a misconception of the extent of the decision in **Northern Pacific Ry. Co. vs. Egeland**, or to the erroneous assumption that this case involved in some way a breach of the master's positive or nonassignable duty to furnish the servant a safe place. In his opinion restoring the motion for a new trial to the docket (Tr., p. 18) he said:

> "In **Railroad Co. vs. Egeland**, in **163 U. S. 73**, and in **C. C. A., 56 Fed. Rep. 200**, a case very similar to the present one, there is no intimation that, because of a local statute, the fellow-servant doctrine did not apply, and yet we find that a decision by the trial Court in favor of the plaintiff was sustained, both in the Circuit Court of Appeals and in the Supreme Court."

It is immaterial whether or not there was a local statute in Minnesota, where the **Egeland** case arose, abolishing the fellow-servant rule. It is at least certain that the defense was not raised in the case, either because it could not be by reason of a local statute or because the defendant did not elect to do so, and the conclusion of the trial Judge that that case has any bearing in determining the merits of the defense raised in this is, we submit, quite untenable.

(e) Nor, we submit, is the assumption, which we infer from the general charge was made, more correct—namely, that this case involves any breach of any of those duties which have been designated by the decisions of this and the Supreme Court of the United States as the personal or nonassignable duties of the master.

It is not claimed that the plaintiff was injured by reason of any intrinsic defect either in the train from which, or in the station platform or station grounds upon which, he alighted. His injury, if not due to his own act, was proximately due to the act of the engineer in causing the train to jerk at the moment he was in the act of alighting.

The case is not, therefore, one of those of the type of **Hutton vs. Holbrook, 139 Fed. 734**, in which it is sometimes difficult to determine whether the injury is caused by the intrinsic defects of a place or appliance which the servant is to occupy or use in the discharge of his duties, and which it is the master's duty to use reasonable care to furnish in safe condition, or whether it is caused by the negligence of a fellow-servant, operating to render

a place or appliance, intrinsically or originally safe when furnished by the master, unsafe and dangerous.

(f) At page 41 of the transcript it will be seen that the plaintiff below sought to bolster up his case by trying to show that "the company had established a dangerous practice of jumping off trains at Waggaman as they slowed down." As to this singular phraseology and proposition, it is enough to say the proof was not forthcoming. There were individual instances of persons who took such risks, but the conductor, engineer and telegraph operator never heard of such a practice, and there is not a scintilla of evidence that the company had established such a practice. (See Tr., pp. 56, 59, 60.) And so far as employees may have indulged in such a practice, Bourman knew about it, and assumed the risk (p. 41).

We submit on the foregoing that the trial Court erred in not granting the motion to direct, and that such error justifies the reversal of the judgment. If this be not so, we urge the following further assignments of error, based on charges refused and given:

SECOND POINT.

The Court below erred in not charging, as requested, that, if the jury found the train which caused the injury was jerked or started forward by the engineer prior to being brought to a full stop just at or prior to the moment that the plaintiff undertook to jump therefrom, the act of the engineer was not such negligence as entitled the plaintiff to recover.

Bill of Exceptions No. 5 (Tr., p. 31); Assignment of Error No. 3 (Tr., p. 76).

The defendant requested, and the trial Court refused, the following charge:

> "I charge you that a locomotive engineer has, in the absence of notice to the contrary, the right to assume, whilst handling his train, that persons being conveyed thereon will not attempt to alight while such train is in motion. If, therefore, you find from the evidence that the train which caused the injury was jerked or started forward by the engineer prior to being brought to a full stop at Waggaman Station, and just at, or prior to, the moment that the plaintiff undertook to jump therefrom, then the act of the engineer in so jerking or starting said train was not such negligence as entitles the plaintiff to recover in this case."

For the reasons given and on the authorities cited in connection with the first point of this brief, we submit that the lower Court erred in not giving the above charge. If the jerk of the train was, in fact, caused by any act or omission of the engineer, and if such act or omission might, under any circumstances, be deemed negligent, it could not be deemed negligent in the absence of any reason on the engineer's part to apprehend that it would result in injury to anyone, and the plaintiff's injury was not, therefore, the probable and natural result thereof.

THIRD POINT.

The Court below erred in declining to instruct the jury that the plaintiff and engineer were fellow-servants.

Bill of Exceptions No. 6 (Tr., p. 32; Assignment of Error No. 4 (Tr., p. 76).

The defendant in the Court below requested the following special charge, which was refused:

> "If you find from the evidence that the plaintiff's injury was caused by the negligence of the engineer of the train on which plaintiff was being transported, and not by the plaintiff's own act or negligence, then I charge you that the negligence of said engineer was the negligence of the plaintiff's coservant, the risk of which the plaintiff assumed, and your verdict must must be for the defendant."

The apparent theory of the trial Court was that the cause of the plaintiff's injury was, or might be, either the negligence of his foreman, the negligence of the engineer, or his own negligence or voluntary act, and, accordingly, in a highly abstract charge, it, in effect, left it to the jury to determine to which of these causes the injury was due. As shown above under the first point, the plaintiff and the engineer were fellow-servants, and we were entitled to the specific charge. The refusal to charge was injurious, as the jury may have attributed the accident to the neglect of the engineer, and it cannot be here assumed that it did not do so.

FOURTH POINT.

The trial Court erred in refusing to instruct the jury that the plaintiff's act in jumping from a train moving at from eight to ten miles an hour was negligence, and defeated a recovery.

Bill of Exceptions No. 7 (Tr., p. 33); Assignment of Error No. 5 (Tr., p. 76).

The defendant requested the following charge:

> "The risk of jumping from a train moving at a rate of from eight to ten miles an hour is a clear and obvious one, and, if you find from the evidence that the plaintiff undertook to jump from a train moving at that rate of speed, and was injured thereby, then he was negligent in so doing, even if ordered by Hadnott so to do, and cannot recover in this case for such injury."

It is perfectly well settled that, where a servant obeys a dangerous order, with knowledge of the danger, he cannot recover for injury sustained in consequence of doing so. We submit the foregoing assignment of error on the authorities already cited under the first point of this brief.

FIFTH POINT.

The Court below erred in charging the jury that it was the duty of the defendant to use ordinary care in affording the plaintiff a reasonably safe opportunity of alighting at Waggaman Station.

Bill of Exceptions No. 9 (Tr., p. 35); Assignment of Error No. 6 (Tr., p. 78).

The Court, in its general charge, used the following language to the jury:

> "It was the duty of the defendant railway company to use ordinary care in affording the plaintiff a reasonably safe opportunity of alighting at Waggaman Station. The main question for you to decide is: Did the defendant railway company afford the plaintiff such an opportunity? If the defendant did not do so, and the plaintiff did not contribute to his

own injury by his own negligence, and did not assume the risk of alighting at Waggaman in the manner in which he did, then the defendant railway company would be liable to him for his injuries. * * *

"But I repeat to you that it was the duty of the defendant railway company to afford the plaintiff a reasonably safe opportunity to alight at Waggaman.

"Therefore, if you find that the defendant railway company failed in this duty, that the failure was the direct and proximate cause of plaintiff's injury, that the plaintiff did not assume the risk, and that he did not contribute in any way to his injury by his own negligence, then you should find in favor of the plaintiff for such damages as he has suffered."

The uncontradicted evidence was that the train had been ordered to stop at Waggaman, was in the process of being slackened up for the purpose of stopping when the plaintiff jumped, and that it actually did stop at such station, and within a few car-lengths of the place of the accident, before the engineer had any knowledge of the plaintiff's reckless act or its consequences.

A duty to use ordinary care to afford a person a reasonably safe opportunity of alighting at a given place is, and can only be, performed by stopping the train at such place for a sufficient time to allow such person to get off. It is not disputed that the defendant did this, and the above charge is erroneous and misleading in assuming the existence of evidence from which the jury might infer the contrary.

Chicago vs. Robbins, 2 Black, 429.

Nothing is better settled than the rule that it is reversible error to charge a jury on a matter concerning which there is no legal evidence. A jury is easily misled, especially in a case where their sympathies may be excited. It is so easy for them to say: "The Judge told us it was the duty of the railway company to afford the plaintiff Bourman a reasonably safe opportunity to alight at Waggaman, and in alighting he was hurt, and, therefore, the railway company is to blame, and must pay the unfortunate man."

No result could be more unjust. There was not a particle of evidence to show a failure of the duty referred to on the part of the company, or its engineer, conductor or other official, and it may be fairly assumed that this part of the charge produced just the effect we suggest.

And this part of the charge is further erroneous in assuming that, if the engineer negligently omitted to afford such opportunity, negligence would give the plaintiff, the engineer's fellow-servant, a right to recover.

If the language used had reference to any act or omission of the engineer in causing the train to jerk prior to bringing it to a full stop, and can be construed to mean that the engineer was under a duty to use ordinary care in handling the train prior to stopping it, then the instruction is amenable to the objections (1) that it assumes the existence of evidence from which the jury might infer negligence on the part of the engineer (which evidence we have heretofore contended that the record

does not afford), and (2) that it assumes that negligence on the part of the engineer would give the plaintiff a right to recover—an assumption that again ignores the defense that the plaintiff and the engineer were fellow-servants.

We ask that the judgment be reversed and the case remanded.

WILLIAM WIRT HOWE,

CHARLES PAYNE FENNER,

Of Counsel for the Texas and Pacific Railway Company, Plaintiff in Error.

October, 1908.

TEXAS AND PACIFIC RAILWAY COMPANY v. BOURMAN.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 56. Argued January 6, 7, 1909.—Decided February 23, 1909.

The engineer of a train, and the section foreman, are fellow-servants of a section hand, and the latter cannot recover against the employer for an injury occurring through the negligence of either of the former. *Northern Pacific Railroad* v. *Egeland*, 163 U. S. 93, distinguished. 160 Fed. Rep. 452, reversed.

THE facts are stated in the opinion.

Mr. Charles Payne Fenner, with whom *Mr. William Wirt Howe* was on the brief, for plaintiff in error:

Plaintiff's injury was not due to any negligence on the part of the railway company. A plaintiff, in the first instance, must show negligence on the part of the defendant. The negligence of a defendant, as stated in that case, cannot be inferred from a presumption of care on the part of the person injured. A presumption in the performance of duty attends the defendant as well as the person injured. It must be overcome by direct evidence. *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480–488.

There is no proof, or even pretense, that the railway company did not provide a safe place to work, that the appliances were not safe, or that there were any of those defects in machinery, track, platforms or the like which sometimes afford grounds of complaint, as considered in the case of *Choctaw &c. R. R. Co.* v. *McDade*, 191 U. S. 64.

Nor is there any proof of negligence on the part of any employé of the railway company, except Bourman himself. *Coyne* v. *Union Pac. Ry. Co.*, 133 U. S. 370.

It is obvious that, even if the evidence did show any negligence on the part of defendant's employés other than Bourman himself, then it was the negligence of plaintiff's fellow-servants. *Louisville & Nashville R. R. v. Stuber*, 108 Fed. Rep. 934; *Thom* v. *Pittard*, 67 Fed. Rep. 232; *Northern Pac. R. R. Co.* v. *Charless*, 162 U. S. 359; *Baltimore & Ohio R. R. Co.* v. *Camp*, 65 Fed. Rep. 952; *Martin* v. *Railway Co.*, 65 Fed. Rep. 384; *Coulson* v. *Leonard*, 77 Fed. Rep. 538; *Railroad Co.* v. *Egeland*, 163 U. S. 73, discussed and distinguished.

Mr. Aldis B. Browne, with whom *Mr. Albert Voorhies*, *Mr. A. E. Livaudais*, *Mr. Oliver S. Livaudais* and *Mr. Alexander Britton* were on the brief, for defendant in error:

The generally-acknowledged doctrine under the law is that a servant entering employment impliedly agrees with his master to assume all ordinary risks incidental to the service, including that of negligence on the part of a fellow-servant, unless the master's personal negligence caused, or operated to cause, the injury complained of. See Barrows on Negligence, 125.

A servant has a right to expect a reasonable degree of care on the part of his master and those in authority under his master, and he may act in accordance with this assumption. Dresser, Employers' Liability, Assumption of Risks, par. 111, p. 528. If the master's negligence concurs with that of a fellow-servant to produce injury, the servant may recover, provided he did not, by his own negligence, contribute to the result. Barrows on Negligence, p. 146; *Tutrix* v. *Sellers*, 39 La. Ann. 1011; *Powers* v. *Calcasieu Sugar Company*, 48 La. Ann. 483; *McCarthy* v. *Whitney Iron Works*, 48 La. Ann. 978; *Bland & Wife* v. *Shreveport Belt Railway Company*, 48 La. Ann. 1057; *Wilson* v. *La. & N. W. R. Co.*, 51 La. Ann. 1134; *S. C.* 108 La. 590; *I. C. R. R.* v. *Josey*, 54 L. R. A. 78. See also: *Wenona Coal Co.* v. *Holmquist*, 152 Ill. Rep. 590; *A. A. Patten* v. *Railroad Co.*, 96 N. C. Sup. Rep. 455.

Even admitting that the accident was due to the fault of either the foreman, conductor or engineer, having the train in

charge, this case comes under the exception where the company cannot avoid responsibility, for the reason that they themselves participated in the negligence and contributed to the accident. *Quebec Steamship Company* v. *Merchant*, 133 U. S. 375.

The defendant was not guilty of negligence in leaving the train in the manner shown by the evidence, nor can he be held accountable for having done so, because he was following the instructions of his superior, the vice principal of the company, his employer; and, that to be made guilty of negligence in obeying said order, it must be shown that he voluntarily and unnecessarily exposed himself to the danger. *David Ballard* v. *C., R. I. & P. R. Co.*, 51 Missouri, 453; *Northern Pac. R. R. Co.* v. *Egeland*, 56 Fed. Rep. 200; affirmed 163 U. S. 93; *Brown* v. *Ohio & Miss. Ry. Co.*, 138 Ind. Rep. 648; *McGinn* v. *McCormick*, 109 La. Ann. 396; *Hunn* v. *R. R. Co.*, 44 N. W. Rep. 502; *R. R. Co.* v. *Charless*, 162 U. S. 359; *Grand Trunk Ry. Co.* v. *Cummings*, 106 U. S. 700; *Milwaukee* v. *St. Paul R. R.*, 112 U. S. 377; *Ellis* v. *N. Y., L. E. & W. R. R. Co.*, 95 N. Y. 546.

MR. JUSTICE MOODY delivered the opinion of the court.

The defendant in error, hereafter called the plaintiff, brought an action in the Circuit Court of the United States against the plaintiff in error, hereafter called the defendant, to recover damages for injuries alleged to have been suffered through the defendant's negligence. The plaintiff had a verdict, which was affirmed by the Circuit Court of Appeals, and under existing statutes regulating the jurisdiction of this court the defendant, because it is incorporated under a law of the United States, has a further appeal, and brings the judgment here by writ of error.

The facts of the case are few and simple. The plaintiff was a section hand employed by the defendant and working under direction of a foreman named Hadnott. The plaintiff, with others, had been employed under Hadnott's direction in clearing up a wreck near a flag station on the defendant's road. When the work was finished the men were taken aboard an express

passenger train, known as the Cannon Ball, to be conveyed to Waggaman, a regular station on the road, where they lived. The express ordinarily did not stop at Waggaman, but simply slowed down to take on the mail. The conductor, however, directed the engineer to stop on this occasion and let the section hands off, and the train did in fact stop at Waggaman, though whether as the result of the order or of the injury to the plaintiff was in dispute. As the train approached Waggaman the men were standing on the steps of the car, ready to alight, and the train was slackening its speed. The plaintiff was on the lower step. What happened is shown by the plaintiff's testimony. He said:

"I stood all the time on the platform. The train blew for the station. When she blew we all got on the steps with our tools in our hands. She was slacking up speed. I was on the lower step, holding on to the rod of the step. That was the way to get off when we was to get off at the depot. The foreman said: 'Boys, throw your tools off, and let us get off.' That was before she got to the station; and when she slacked up, she slacked up slow enough for anybody to get off, and when I went to get off she jerked; and I grabbed, and the engineer put more speed to the engine, and that threw me down and I could not let go, and she dragged me along until I got weak in the arms, and let go. She was running slow and she slacked up speed, and then she let go again and she made a jerk. After she slacked she started up again. I held on until I lost my grip and could not hold on any more. I fell, going under, and the wheel run over my leg. The conductor hallooed to the engineer to back up the train. He said: 'He ought to be satisfied.'"

On cross-examination he testified as follows:

"Q. Did he (the foreman) speak to you? A. No, sir; he did not.

"Q. He said nothing to you at all? A. When we were on the way coming we were all speaking, but when the train slacked up—when they blew the whistle for the train to stop at the depot, he told us, 'Boys, get your tools, we will get off.'

"Q. That was while she was slacking up? A. Yes, sir.

"Q. You say that you jumped when the train slowed at the depot? A. Yes, sir.

"Q. That was before it stopped? A. She was not going to stop there at all.

"Q. You did not know that, that is, before she stopped? A. Well, she did not stop at all.

"Q. You jumped while the train was moving? A. Yes, sir.

"Q. Then you say that the train started up suddenly? A. Yes, sir; at the time I was getting off, she jerked before I jumped loose.

"Q. Do you think it would have been the same, that you would have been hurt if the train had not started again? A. No, sir; I do not think it would."

The petition, which was very inartificially drawn, does not clearly state the ground upon which the plaintiff sought to hold the defendant liable. It states generally that "said misfortune" was "due to the fault and negligence of the said defendants;" that the plaintiff was "entitled to a safe transport" to Waggaman; and that the "train being about to pass the station your petitioner had no further alternative than when ordered by his foreman to jump from the moving train, which just then increased its speed."

The answer denied the allegations of the petition and averred that if the plaintiff was injured it was by his own voluntary act in jumping from the train or through the negligence of one or the other of his fellow-servants—the section foreman, or the conductor and engineer of the train.

But passing the question of pleadings, upon which nothing seems to have turned below, we consider the case as it appears from the evidence. Since the plaintiff jumped from the train in obedience to a suggestion, if not an order, of his immediate superior, the section foreman, the jury might have found that the plaintiff reasonably thought he could rely upon the judgment of the section foreman, and that under the circumstances the plaintiff's act was not so obviously reckless and dangerous

as to constitute contributory negligence. *Northern Pacific Railroad* v. *Egeland*, 163 U. S. 93. It becomes necessary, then, to consider the negligence of the defendant. The evidence discloses two possible grounds upon which a recovery might be rested; first, carelessness of the section foreman in directing the plaintiff to jump when he did; second, carelessness of the engineer in suddenly starting up the train after it had slowed down. These two possible causes of the plaintiff's injury were distinctly before the jury and the defendant had the right to appropriate instructions upon the issues thus raised. The jury may well have based its verdict on either the carelessness of the section foreman or the carelessness of the engineer. Indeed, it is difficult to see any other theory upon which the verdict was rendered. It may be, as thought by the Circuit Court of Appeals, that the instructions to the jury were academically correct, so far as they went, but they omitted to cover vitally important aspects of the case and were therefore insufficient.

The presiding judge refused to instruct the jury as requested by the defendant, that the engineer and the section foreman were, respectively, fellow-servants of the plaintiff, and that if the injury occurred through the negligence of either, the plaintiff was not entitled to recover. We think these instructions should have been given. Both the engineer and the section foreman were fellow-servants of the plaintiff and if the plaintiff's injury was caused by the negligence of either, the law, as it many times has been declared by this court, will not permit a recovery. *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368; *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349; *Central Railroad Company* v. *Keegan*, 160 U. S. 259; *Northern Pacific Railroad* v. *Peterson*, 162 U. S. 346; *Northern Pacific Railroad* v. *Charless*, 162 U. S. 359; *Martin* v. *Atchison, Topeka & Santa Fe Railroad*, 166 U. S. 399; *Alaska Mining Company* v. *Whelan*, 168 U. S. 86; *New England Railroad* v. *Conroy*, 175 U. S. 323; *Northern Pacific Railroad* v. *Dixon*, 194 U. S. 338.

The case of *Northern Pacific Railroad* v. *Egeland*, *supra*, which evidently was misunderstood in the court below, is not

in any way inconsistent with the foregoing cases. The fellow-servant doctrine was not there considered by the court. The plaintiff in that case was a section hand, who received injuries by jumping from a moving train in obedience to the order of the conductor. The only question before this court was whether the act of the plaintiff was in itself, as matter of law, contributory negligence, and it was held that under the circumstances disclosed in the evidence it was proper to submit the question of contributory negligence to the jury. It does not appear in that case what was the negligence for which the plaintiff sought to hold the defendant responsible. In the trial court the defendant made two requests: First, that no negligence on the part of the defendant was shown; and, second, that the plaintiff was guilty of such contributory negligence that he could not recover. The defendant saw fit to bring to this court only the question of contributory negligence, and the opinion of the court expressly stated that the discussion would be confined to that question alone. An examination of the case, as it was exhibited to the Circuit Court of Appeals, discloses that contributory negligence was the only question passed upon by that court. 56 Fed. Rep. 200.

Judgment reversed.